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Newly Printed for Timothy Goodwin, *at the* Maiden-Head, *againſt* S. Dunſtans Church, *in* Fleetſtreet.

AN Enquiry into the Power of Diſpenſing with Penal Statutes; together with ſome Animadverſions upon a Book, writ by Sir *Edward Herbert*, Lord Chief Juſtice of the Court of *Common-Pleas*, Entituled, *A ſhort Account of the Authorities in Law, upon which Judgment was given, in Sir* Edward Hales's *Caſe*. By Sir *Robert Atkins*, Knight of the Honourable Order of the *Bath*, and late one of the Judges of the Court of *Common-Pleas*.

THE

Power, Jurisdiction and Priviledge

OF

PARLIAMENT;

AND THE

ANTIQUITY

OF THE

House of Commons

ASSERTED.

OCCASION'D

By an Information in the *Kings Bench*, by the Attorney General, against the Speaker of the House of Commons.

As also a Discourse concerning the

Ecclesiastical Jurisdiction

IN THE

REALM of ENGLAND,

Occasion'd by the

Late Commission in Ecclesiastical Causes.

By Sir *ROBERT ATKYNS*,
Knight of the Honourable Order of the *Bath*, and late one of the Judges of the Court of *Common-Pleas*.

LONDON,
Printed for *Timothy Goodwin*, at the *Maiden-Head*, against S. *Dunstans Church* in *Fleetstreet*. 1689.

IN THE KINGS BENCH,

TRIN. 36 *CAROL.* II.

BY

INDICTMENT.

Middlesex.

THE *Kings Attorney informs the Court;*
That W. W. *Esq; being a Pernicious and Seditious Man, and Contriving and Practising Falsly, Maliciously and Seditiously, to disturb the Peace and Quiet of the Kingdom:*
And to stir up Sedition, and to procure Ill-Will between the King and his Subjects:
And to bring the D. of Y. *into Contempt with the King and his Subjects.*
In order to the Compassing of all these,
The ninth of November, 34 Car. 2, *In the Parish of S.* Martins in the Fields, *in the County of* Middlesex,
He the said W. W. *did with Force and Arms, Falsly, Unlawfully, Unjustly, Wickedly, Maliciously, Scandalously, Seditiously and Devillishly, for his own Lucre,*
Cause and Appoint a certain False, Scandalous, Seditious and Infamous Libel; entituled, The Information of *Thomas Dangerfield,* Gentleman, *to be Printed and Published.*
In which Libel, (among other things) are contained, as followeth: The Information of *Thomas Dangerfield*, Gentleman, *&c.* (*the Contents of it have been read, and need no Repetition.*) *In Contempt of the Law, and to the ill Example of others; and against the Peace, and the Kings Crown and Dignity.*
And the King's Attorney prays Process against him, That he may be brought in to answer it.

The Defendant pleads to the Juriſdiction of this Court, and ſays,

That by the Law and Cuſtom of Parliament,

The Speaker of the Houſe of Commons ſitting, the Parliament, according to the Duty of his Office, as Servant to the Houſe, ought, and ever has accuſtomed, to Speak, Sign and Publiſh ſuch Proceedings of that Houſe, and in ſuch manner as he ſhall be ordered by the Commons ſo aſſembled:

And that ſuch Speaking, Signing or Publiſhing, according to the Law and Cuſtom of Parliament, are the Act and Doing of the Commons themſelves; and hath ever been ſo accepted and taken, and not as the Speakers own Acting or doing.

And that the Speaker, for ſuch Speaking, Signing or Publiſhing by him made or done, ſitting the Parliament; and by their Order, ought not to anſwer in any other Court or Place, but in Parliament.

He further ſays, That at the Seſſions of Parliament at *Weſtminſter*, the 15th. of *March*, 31 *Car.* 2, held by Prorogation,

One *William* Viſcount *Stafford* and others, were impeached by the Commons, before the Lords, according to the Law and Cuſtom of Parliament, of High Treaſon,

For a moſt execrable Conſpiring to kill the King,

And to Alter and Subvert the Ancient Government, and the Laws of the Realm.

And to Suppreſs the true Religion eſtabliſhed in this Kingdom.

And to root up and deſtroy the Profeſſors of it.

And that afterwards, in the Seſſions of Parliament, held by Prorogation, at *Weſtminſter*, 21 *Octob.* 32 *Car.* 2.

The ſaid Viſcount *Stafford*, at the Proſecution of the Commons, was Tried, and Convicted, and Attainted, in due Form of Law, by the Temporal Lords then aſſembled in Parliament, for the High Treaſons, of which he was ſo Impeached by the Commons;

As by the Record of Parliament does appear.

He further ſays, That in the opening of that Seſſion,

The King, in his Speech to the Lords and Commons, charged them to purſue a further Examination of that Conſpiracy, with a Strict and *Impartial* Enquiry.

And the King then told them, That he did not think himſelf nor them ſecure till that matter was throughly done.

He further ſays, That in the ſame Seſſions of Parliament, laſt mentioned, which continued at *Weſtminſter* till 10 *Jan.* 32 *Car.* 2. both Houſes of Parliament, in purſuance of his Majeſties ſaid Direction, made a Strict and Impartial Enquiry after that Conſpiracy.

And

And upon that Enquiry, in the ſame Seſſions of Parliament, laſt mentioned, the ſaid *Thomas Dangerfield*, in the ſaid Information named, did upon his Oath exhibit to the Lords in Parliament, the ſaid Libel (entituled, *The Information of* Thomas Dangerfield, *Gentleman*) as his true Information of that Conſpiracy: And delivered it to the Lords, which was and is there Recorded, as by the Record thereof in Parliament does appear.

And he alſo delivered it to the Houſe of Commons in the ſame Parliament, at the Bar of that Houſe.

And the ſaid Commons then ordered, That that Information (among others, then before given in at the Bar of that Houſe, touching the ſaid Plot) ſhould be entred in their Journal.

And that all the ſaid Informations ſhould be printed, being firſt Peruſed and Signed by their Speaker:

And that the Speaker ſhould name and appoint the Perſons that ſhould print them:

And that *Thomas Dangerfield* ſhould have the Benefit of the Printing of his Information.

And the Defendant further ſays, That he was a Member of the Houſe of Commons during all the Seſſions of Parliament, laſt mentioned, and was duly Elected and Made their Speaker, and was ſo all that Seſſions.

And that by virtue of, and in purſuance of the ſaid Order, as Speaker of the Houſe, afterwards, during that Seſſion, *ſc.* 10 *Nov.* 32 *Car.* 2. in the Pariſh of S. *Martins in the Fields*, in the ſaid County of *Middleſex*,

He did Peruſe the ſaid Information, ſo exhibited by the ſaid *Thomas Dangerfield* to the Commons, and he Signed it by putting to it his Name, *viz. William Williams*, Speaker of the Houſe of Commons.

And then and there appointed *Thomas Newcomb* and *Henry Hills* (being the Kings Printers) to Print that Information, according to the ſaid Order of the Houſe of Commons.

And thereupon the ſaid Information afterwards, and during that Seſſion, *ſc.* 10 *Nov.* 32 *Car.* 2. was printed by thoſe two Printers.

And that the ſaid *Thomas Dangerfield* had the Benefit of that Printing, according to the Order of the Houſe.

Which Setting to of his Name, and Appointment of the ſaid Printers to Print the ſaid Information, are the ſame Cauſing and Appointing of the Printing and Publiſhing of the Libel in the Attorney General's Information mentioned.

Abſque hoc, That he is Guilty of the Premiſes in the ſaid Attorney General's Information ſpecified, on the ninth of *November*, in the ſaid Information ſpecified, or at any other Time after the ſaid Seſſion of Parliament, or before it; or otherwiſe, or in any other manner than as he has above alledged.

And

And this he is ready to aver, *&c.*

Wherefore, and for *that what he ſo did, was done by him as Speaker* of the Houſe of Commons, in Parliament, and by *their Order*, and *Sitting the Parliament*,

He demands the Judgment of this Court, Whether this Court will take any further cognizance of this Matter.

Kings

Kings Bench :

The Kings Attorney is Plaintiff, and W. W. *Esq; Defendant, in an Information for a Misdemeanour.*

The Information sets forth, &c. vide *the Brief of the Record.*

THE Information taken singly by it self, (without the Defendents Plea) contains a very Severe and Heavy Charge in it, against the Defendant, set out with the higheſt Aggravations : Introduction.

And this againſt a Gentleman of the Profeſſion of the Law, and one who hath had the Honour to be Speaker of ſeveral Parliaments.

We may obſerve in this Information the worſt of *Adjectives* or Epithites faſtned upon the Defendant : It ſtiles him, A *Pernicious* and *Seditious* Man.

It charges him with the worſt of *Actions* ; ſc. *Stirring up of Sedition, Diſturbing the Peace of the Kingdom, endeavouring to procure Ill-will between the King and his Subjects ; and to bring the D. of* Y. *into Contempt with the King and his Subjects* ; *and with the Printing and Publiſhing* a Falſe, Scandalous, Seditious and Infamous Libel.

Theſe Crimes and Actions are ſet out in Mr. Attornies Information with the worſt of *Adverbs* ; and with a great Heap of them together ; *viz.* That theſe things were done by the Defendant, *Falſly, Unlawfully, Unjuſtly, Wickedly, Maliciouſly, Scandalouſly, Seditiouſly* and *Devilliſhly*.

And to add (if poſſile) to all this, it is charged to be done out of one of the baſeſt Principles : Out of *Malice* ; and for one of the moſt Sordid and Odious Ends, *viz.* For *his own Lucre*.

It may further be obſerved, That the Information does not alledge or affirm, That there is any ſuch Perſon in the World as *Thomas Dangerfield* (though it mention the Name ;) nor that any ſuch Perſon did ever Frame or Draw up any ſuch Scandalous and Libellous Book or Information, as is mentioned in Mr. Attorneys Information.

But (for all that, Mr. Attorney ſhews) the Name of *Thomas Dangerfield*, may be but a feigned or borrowed Name, and that the Defendant may be the Author and Compoſer of this Libel, as well as the Publiſher.

And one would not imagine, upon reading Mr. Attorney's Information, that any thing of theſe Matters, thus charged, was ever tranſacted in Parliament: But Mr. Attorney gives them another Date, both of Time and Place. He does not lay the Scene at *Weſtminſter*, but at S. *Martins in the Fields*, and he *times* it to the Year 1682. whereas there was no Parliament in that Year. This was warily done.

Time and Place not material, unleſs the Defendant make them ſo, by his Plea, (as here.)

Thus the Caſe ſtands upon Mr. Attorney's Information, and ſhould it be left here, it would be a woful Caſe with the Defendant;

But as *Solomon* ſays in his *Proverbs*;

The firſt in his own cauſe is juſt, then comes the other party and enquires into him.

The plain Engliſh of which is (as we uſe to ſay) *One Tale is good till another is told.*

Plea.

The Defendant, in his Plea, ſtates the matter truly and fully, and tells us, That there is nothing true in this Information exhibited againſt him, ſave only that there was ſuch an Information of *Dangerfields*, but that the Defendant was none of the Author.

It was drawn up and delivered in to both Houſes of Parliament, firſt to the Lords, upon Oath; and there ordered to be entred in their Journal: And afterwards delivered at the Bar of the Houſe of Commons.

And that the Defendant, being Speaker of the Commons, he examined that Information of *Dangerfields*, and directed the Printing of it: But it was all done in time of Parliament, and ordered to be done by the Houſe of Commons.

By this Narrative of the Plea, all the unlucky Adjectives and untoward Adverbs are thrown off, and the Defendant cleared from the Malice.

Nor is it true that is ſaid in Mr. Attorney's Information, To be done for the Defendants Lucre. He did it out of Obedience to the Parliament; and he denies that he made any Profit by it, but according to the Order of the Houſe; the Profit of the Printing was to *Dangerfield*. And all this is confeſſed by the Demurrer.

The Plea conſiſts of theſe Parts: Matter of Fact, Matter of Record, and Matter of Law.

It begins with Matter of Law; and ſets down the Law and Cuſtom of Parliament.

Then he does aſſume the Matter of Fact, and of Record, and brings them home to that Law.

He tells us, That, *for certain*, there was ſuch a thing as a Popiſh Plot, and that it was a Deſperate, Horrid, Deviliſh Plot.

Plot. And here all the bitter Adjectives and Adverbs would have been well beſtowed, rather than upon the Speaker of that Parliament; which Parliament with ſuch admirable Zeal and Courage did proſecute ſome of thoſe Plotters.

He ſets forth, That——the Lord *Stafford* was in Parliament Convict before the Lords of High Treaſon, committed in that Plot; and he was Covicted at the Proſecution of the Commons, according to the Law, and Cuſtom of Parliament.

He ſays, That the King in his Speech to the Lords and Commons, charged them to make a further ſtrict and impartial Enquiry after this Plot.

Then the Plea tells us, They did accordingly make an impartial Enquiry, and diverſe others were thereupon convicted of that Plot.

It now appears plainly, That all that is contained in this Plea was not only done during the Parliament, but by the Parliament it ſelf; and that the Defendant only acted as Speaker.

And it is worth the remembring too, That there has been another Parliament ſince, namely that at *Oxford*.

And though all that was done by him in the Parliament at *Weſtminſter*, was then very well known and remembred; and though he were ſo Pernicious and Seditious a Man, in the Opinion of Mr. Attorneys Information, yet the World had a better Opinion of him, for he was choſen Speaker again, in that latter Parliament, and his Majeſty approved of him.

At laſt, the Defendant concludes his Plea *to the Juriſdiction of this Court: viz.* That what he had ſo acted, being acted in Parliament time, and by Order of Parliament, he demands the Judgment of this Court, Whether they will take Conuſance of it. Concluſion of the Plea.

The Attorney General demurr'd to it.

THE Subject Matter of this Record is a very large Field, *viz.* The Power and Juriſdiction of Parliament, and yet I ſhall have but a narrow Path to walk in. It is a very Nice and Tender Point: It is my Caſe, as it was heretofore with thoſe that were to undergo the old Saxon Trial by Fire *Ordail (per ferrum candens)* If I tread aſide and make a wrong Step, I may do my ſelf a Miſchief.

But by the Grace of God, I ſhall take care neither on the one hand to give any juſt occaſion of offence to thoſe above me; nor yet on the other hand, ſhall I be wanting in that Duty I owe to the Kingdoms Cauſe. I ſhall ſpeak my mind freely in it, and leave the Succeſs to God.

And while I muſt argue for the freedom of acting in Parliament, and ſpeak for the Speaker, and endeavour to maintain their

their Rights and Priviledges, I may juſtly claim that ordinary and reaſonable Priviledge for my ſelf, that if I happen unawares to miſplace a Word, or to be miſapprehended in what I ſay, I may have the liberty inſtantly to explain my ſelf.

And I take my ſelf to be under the protection of the Law, while I argue the Law.

Three Points

In arguing this Caſe, I ſhall make three Points, or lay down theſe three Poſitions.

1. That what is done in this Caſe, is done in a courſe of Juſtice, and that in the higheſt Court of the Nation (the Parliament) and according to the Law and Cuſtom of Parliament.

2. That however, that which is done in this Caſe, is not to be imputed to the Defendant, who acted in it but as the Servant or Miniſter of the Parliament, though in a very honourable Station.

3. That theſe being Matters tranſacted in Parliament, and by the Parliament, this Court of the *Kings Bench* ought not to take conuſance of them; nor hath it any Juriſdiction to judge or determine of them.

Firſt Point.

As to the Firſt, I ſhall frame this *Syllogiſm*.

No Indictment or Action lies for what is done in a courſe of Juſtice, or in a way of Legal Proceeding.

But what has been done by the Defendant, and by the Houſe of *Commons* in this Caſe, hath been done in a courſe of Juſtice, and in a way of Legal Proceedings, and that in the higheſt Court of the Nation.

Therefore what hath been here done, is neither ſubject to an Action or Indictment.

Firſt Propoſition.

I ſhall firſt prove the *Major* Propoſition.

That *no Indictment* or *Action* lies for what is done in a Courſe of Juſtice.

Reaſon.

The Reaſon of the Law is, That the Law and Courts of Law, and Juſtice, and Remedies againſt wrong, ought to be free and open; and no man muſt be frighted nor diſcouraged from a Legal Proſecution of his Right.

Authority.

To prove this, I ſhall make bold to cite the Opinion and Authority of a *Town-Clerk*. The Report of it is in the Holy Scripture, the trueſt and higheſt Report. It was the Opinion and Advice of the *Town-Clerk* of *Athens*. We read it in the *Acts of the Apoſtles*, and it inſtantly ſtill'd and quieted a mighty Uproar, it had ſo much weight in it. *If any man* (ſays he) *have any matter againſt another, the Law is open, and there are Deputies; let them* (ſays he) *implead one another.*

The *Town-Clerk* of *Athens*.

The Parties to a Suit in Law, the Council, the Attorney, the Witneſs, the Officers, the Jury, are all under a protection of the Law for what they do or ſay in the proſecution of a Suit in Law, or any Legal Proceeding. I will

I will put ſome few Caſes ſuited to every one of theſe who are the ſeveral Actors in a Suit.

The Party to a Suit.

By the *Stat.* of 3 *E.* 1. call'd the *Stat.* of *W.* 1. He that reports ſlanderous News, whereby Diſcord may grow between the King and his People, or the Great Men of the Realm, is to be impriſoned, till the firſt Author of the Tale be brought into the Court. This comes near our Caſe; and this is all the Puniſhment that the Statute inflicts upon this Crime of reporting ſuch a Slander.

Sir *E. C.* in his Expoſition upon this Stat. in his 2*d. Inſtit.* 228. ſays, That this Stat. extends only to *Extrajudicial Slanders.*

And therefore (ſays he) if any man bring an Appeal of Murder or Robbery againſt any of the Peers of the Realm, although the Charge be falſe, yet ſhall not the Peer have an Action *De Scandalis Magnatum*, neither at the Common Law, nor by this Stat. of *W.* 1. nor any other Stat. for any ſuch Appeal, nor for affirming the Matter of it to be true, either to Councel or Attorney, or for ſpeaking the ſame in Evidence to a Jury.

Lord *Beauch.* Caſe.

It was the Lord *Beauchamp*'s Caſe, 13. *H.* 7. *Keilway*, 26, 27, 28. Sir *Richard Crofts* ſued a Writ of Forgery of Falſe Deeds againſt the Lord *Beauchamp*: The Lord *Beauchamp* ſues Sir *Richard Crofts* in an Action *De Scandalis Magnatum*, upon the Statute of 2 *R.* 2. *c.* 5. for this Slander, in charging him with Forgery. *Keble*, of Council for the Lord *B.* admits, that at the Common Law no Action did lie for this Slander, it being in a courſe of Legal Proceeding.

But *Keble* was of Opinion, that this Statute of 2 *R.* 2. did give the Action in ſuch a Caſe, though it were a Slander occaſioned by a Suit.

But by *Brian* and the reſt of the Court, the Action *De Scand. Magnatum*, did not lie for ſuch a Slander, though the Matter of it were falſe, becauſe it is in proſecution of a lawful Suit.

With this agrees *Boulton* and *Clapham*'s Caſe in Juſtice *Jone*'s *Rep.* 431. and *Weſton*'s Caſe, *Crok. Jac.* 432.

A Difference.

Sir *E. C.* puts the Difference in his 2*d. Inſt.* before cited.

If a man prefer *a Bill in the Star-Chamber* againſt a great Peer, and charge him with *Forgery or Perjury*, no Action *De Scand. Magnat.* lies, it being in a legal Proceeding, and in a Matter wherein that Court had a Juriſdiction.

But if in ſuch a Bill in the *Star-Chamber* a *Peer be accuſed for Felony* (which that Court hath nothing to do with, nor no Juriſdiction in) this (ſays Sir *E. C.*) has not the face of a Legal Proceeding, and ſhall not excuſe a man in an Action *De Scand. Magn.* Sir *Rich. Buckley*'s *Caſe.* 4 *Rep.* 14. *Cro. Eliz.* 230. *the ſame Caſe.* Yet where there is but a Miſtake of the Juriſdiction, if the Suit be once well commenc'd, ſome little Irregularities in the Proceedings ſhall not expoſe them to the Action *De Scand. Magn.* As,

If a man bring an Appeal of Murder, and through the ignorance of the Party, or his Clerk, or Attorney, it is made returnable in the *Com. Pl.* where they have no Jurisdiction in it: yet no Action *De Scand. Magn.* lies for this, the Suit being well begun, and it being in the Nature of a Lawful Suit. So says Sir *E. C.*

Councellor. In the Case of a Councellor pleading for his Client.

He likewise in what he affirms or pleads for his Client, if it be pertinent to the Matter of the Suit, and he has it by instruction from his Client, he shall be protected against an Action of Slander for it. This is a Point that may concern many of us.

It was the Case of Sir *Hen. Mountagu* Recorder of *London*, M. 3 *Jac. Cro. fo.* 90. in *B. R.*

Ral. Brook brought an Action upon the Case for Slander against Sir *H. M.* for saying of the Pl. *Brook*, that he had committed Felony.

Sir *H. M.* pleaded specially to the Action, That he was a Councellor at Law, and was retained against the Pl. *Brook*, and at the Trial in giving of Evidence to the Jury, he did indeed speak those Words; but averr'd that they were pertinent to the Matter, and were part of his Instruction. It was resolv'd upon a Demurrer, That the Plea was good, the Words being pertinent, though they were false. And there is a further Reason given by the Court in that Case, *viz.* The Words appear not to be spoken out of Malice: And no Actions of this sort, nor will any Indictment of this Nature lie, unless there be Malice in the Defendant; and where there is any justifiable occasion of speaking words that a man in discharge of his Function or Calling is led by the Subject-Matter of Discourse, as a Preacher, or Pleader, or the like, to speak words in such Case; it shall be presumed they were not spoken out of Malice.

Attorney. In the Case of an *Attorney*.

Sir *E. C.* in his 2*d. Instit.* in his Exposition of the Stat. of *Articuli super Chartas*, 28 E. 1. *c.* 10. tells us, That in the very next year after the making of that Stat. *viz.* 29 *E.* 1. *Will. de Weston* brought an *Action of Conspiracy* in the *Kings Bench*, against *William* of *Hempswell*, Parson of *Newton*, and *John* of *Malden*, Parson of *Askerby*, for *causing the Plaintiff to be cited before the Arch-Deacon of* Linc. *for a Trespass, whereof he had been acquitted in the* King's Court. *John* of *Malden* pleaded, That he was *Communis Advocatus pro suo dando*, and so justify'd as *an Attorney*; and it was found the Parson was *Communis Advocatus*, and so not guilty of the Conspiracy.

Witness. In the Case of a *Witness*: For what he says as a Witness, or for what is said against him, to disable him from being a Witness, or to take off his Credit, no Action of Slander will lie.

35 *H.* 6. 14. In an Action of *Conſpiracy*, one of the Defendants juſtify'd as being a *Witneſs*, to the Jury.

Crok. Jac. 432. In the *King's Bench*, *Weſton* againſt *Dobneet*, in an Action for Slander. There was a Suit in the *Spiritual Court*, and the Plaintiff that brought the Action of Slander, was produced as a Witneſs in that Cauſe, and the Defendant in that Suit in the *Spiritual Court*, put in Exceptions againſt him, That he had been perjur'd, and therefore ought not to be uſed as a Witneſs. Thereupon, *Weſton* the Witneſs, brought this Action for that Slander. And after Arguments, the whole Court held, that the Action of Slander did not lie for this manner of Slander, becauſe it was in a courſe of Juſtice, and not *ex Malicia*.

In a Writ of Conſpiracy. One of the Defendants pleaded, that he was one of the Indictors. Judgment, *ſi Actio*. And the Plea is allow'd. 20 *H.* 6, 5. & 33. Juror.

Nay though it be not in a courſe of Juſtice, in a Suit of Law, yet if a man be *in the doing of his Duty*, and in *diſcharge of his Function and his lawful Calling*, and in diſcourſing of a Subject proper for his Function, and enforcing of every mans duty of avoiding of any Sin, and in purſuit of it, tells a Story which he takes up upon truſt, and does not know it to be falſe, and it prove at laſt to be utterly untrue, and an innocent perſon is highly ſlandered by it, yet he ſhall not be ſubject to an Action of Slander for it. The occaſion of ſpeaking ſhall clear him from the Malice, without which the Action will not lie. *Juſta occaſio loquendi.*

In the *Book of Martyrs*, written by *Fox*, there is a Story of one *Greenwood*, who lived in *Suffolk*, that he had perjur'd himſelf before the Biſhop of *Norwich*, in teſtifying againſt a Martyr that was burnt in Queen *Mary*'s time; and ſays (*Fox*) this *Greenwood* afterwards, by the juſt judgment of God, had his Bowels rotted in him, and ſo he died.

This Story by *Fox* in his *Book of Martyrs*, was utterly falſe of Mr. *Greenwood*, and after the Printing of that *Book of Martyrs*, Mr. *Greenwood* was living in that very ſame Pariſh.

One *Priſt*, a Parſon, happen'd to be Preſented to the Living of that Pariſh where this Mr. *Greenwood* then dwelt; and 27. *Eliz.* in one of his firſt Sermons, happen'd to inveigh againſt the Sin of Perjury; to which his Text did lead him; and the better to deter the People from the Sin of Perjury, he told this Story out of *Fox*'s *Book of Martyrs*, and named the very Man Mr. *Greenwood*; and Mr. *Greenwood* himſelf was then in the Church, and heard this Story told of himſelf, but the Preacher knew it not, but thought the Story to be true. *Greenwood* brings an Action of Slander againſt *Priſt* the Preacher; and upon the Trial of the Cauſe before the *Lord Chief Juſtice Wray*, the Caſe appearing to be thus, he directed the Jury to find for the Defendant, for that it appear'd it was not done out of *Malice*: And *Ch. J. Popham* affirm'd it to be good Law, it being a Matter deliver'd *after his occaſion, as Matter of Story.*

This

This Caſe is cited by Sir *E. C.* in Sir *Henry Mountagu*'s Caſe, before mentioned. *Crook. Jac.* f. 90.

With this agrees the Caſe of the Lord *Cromwel*, againſt *Denny* a Vicar, 4 *Rep.* 13. *b.* in an Action *de Scand. Magn.*

There is a Caſe in many Circumſtances of it much reſembling our Caſe.

It was the Caſe between *Smith* and *Craſhaw*, and others *M.* 20 *Jac.* in the *Kings Bench*, in Sir *Jeffr. Palmer*'s *Rep.* 315.

An Action upon the Caſe is there brought againſt the Defendants, for maliciouſly cauſing the Plaintiff to be indicted of Treaſon; upon which Indictment the Grand Jury found an *Ignoramus*.

To this Action the Defendants pleaded Not Guilty, and were found Guilty.

It was moved in Arreſt of Judgment; That to accuſe one for Treaſon was not Actionable, for the Safety of the King and State: For if a Man be ſubject to an Action for it, it will be a means that Treaſon ſhall be ſmothered, and Men will not expoſe themſelves to Actions, by making ſuch Diſcoveries.

J. Houghton held the Action would not lie upon an *Ignoramus* found; for by that the Party is not acquitted, but may be Indicted again and Convicted.

But he holds, That if he be Indicted, and upon Trial *Legitimo modo acquietatus*, then he ſhall have an Action upon the Caſe, in Nature of a Conſpirary; for now he is abſolutely acquitted and cleared of the Accuſation, and never can be Indicted again for that particular Fact.

Dodderidge agrees with *Houghton*, and puts this Caſe;

If an Action of Conſpiracy be brought againſt a Man, For Indicting the Plaintiff of Treaſon, *The Defendant may Plead* Specially (and that is the ſafeſt way of Pleading) *That he heard the Plaintiff ſpeak ſuch and ſuch Treaſonable Words, and that he thereupon complained to a Juſtice of Peace*, who committed the Plaintiff upon it, and this (ſays he) ſhall excuſe him.

Ley, Chief Juſtice, inclines too againſt the Action, and gives a ſtrong Reaſon, Becauſe (ſays he) it is Miſpriſion to Conceal it; and yet if we allow of this Action, it ſhall be Dangerous too to diſcover it, ſo that the Defendant does *Lupum auribus tenere.*

And ſo the Judgment was arreſted.

But we find, that ſoon after, when the Judges of that Court were chang'd, the ſame Plaintiff brought a new Action for the ſame Cauſe: And it was adjudged for the Plaintiff, That the Action would lie; but the Judges acknowledged it was the firſt Precedent. I ſuppoſe it was upon pleading Not Guilty. Perhaps the Court might have been of another Opinion, had the Defendant pleaded ſpecially, and juſtified, according to the Opinion of Judge *Dodderidge*. The Caſe is *Cro. Car.* 15. *& Latch.* 79.

The allowing of ſuch Actions of Conſpiracy, or upon the Caſe, or of Indictments or Informations for what is ſaid or done in a Courſe of Juſtice, and eſpecially by way of Diſcovery of Treaſons, would prove of a miſchievous Conſequence;

And

And would be an occaſion of multiplying Actions againſt the Parties to the Suits, againſt Councel, the Attorneys, the Witneſſes ; and ſo Suits would be infinite.

As in this preſent Caſe, Should an Action be adjudg'd to lie againſt the Defendant for what he has acted by Authority of Parliament, what a multitude of Actions would be ſtirred up by it ?

If the Speaker be liable to this Information for what he has done ; by the ſame Reaſon he would be liable to the Actions of the ſeveral great Perſons that are ſaid to be defamed by the Printing of *Dangerfields* Narrative.

And if the Speaker be liable, who acted but by Command of others, and as their Miniſter, how much more would all thoſe Perſons be ilable, by whoſe Command he ſo acted ?

And how many Narratives have there been printed, wherein ſeveral great Perſons were ſeverely reflected on, and how many Votes of the like Nature have there been Printed ?

So that there would ariſe a Multitude of Suits.

In Sir *Drue Druries* Caſe, *6. Rep.* 74. The Juſtices in judging of that Caſe, give a very good Rule and Caution: They ſay, That Judges ought to have good Conſideration in all Caſes depending before them, not only of the preſent Caſes, but alſo of the *Conſequences*, What general Prejudice may enſue upon them either to the King or Subject.

The Caſe before you exceedingly requires that Conſideration.

The Prejudice to the King will be, that he will not be Safe, for by this means Men will be diſcouraged from diſcovering Treaſons.

The Subjects will receive Prejudice, by the multitude of Suits that will ariſe by it.

This mas ſuffice to be ſaid in maintaining the firſt Propoſition, That no Information or Action lies for what is ſaid or done in a Courſe of Juſtice.

The Minor Propoſition is, That what is here done by the Defendant, in this Caſe, was done in a Courſe of Juſtice, and in a Legal Proceeding, and that in the higheſt Court of the Nation, (in the Court of Parliament) and done according to the Law and Cuſtom of Parliament. This I muſt make out in the next Place. The Minor Propoſition.

In the making this out, I am under a Neceſſity of ſpeaking of the tranſcendent Power of the High Court of Parliament, and I muſt aſſert theſe Poſitions following.

1. That the Houſe of Commons was originally, and from the firſt Conſtitution of the Nation, the Repreſentative of one of the three Eſtates of the Realm, and a part of the Parliament.

2. That what is done by either Houſe, according to the Law and Uſage of Parliament, is properly, and in the Judgment of

Law, the Act of the whole Parliament: And that what concerns the One, muſt of neceſſity concern the Whole; not meerly by Conſequence, but by an immediate Concernment, as being One, and Entire.

3. That what hath been acted in our preſent Caſe, by the Defendant, as Speaker, and by the Houſe of Commons, whoſe Miniſter he was, and by whoſe Command and Order he did what he did, was done according to the Law, and Uſage of Parliament.

The Commons, as now elected, have ever been a part of the Parliament.

As to the firſt, That the Houſe of Commons was from the firſt Conſtitution of this Kingdom, a part of the Parliament.

There has been an Opinion, that hath been ſtifly maintained by ſome Divines, and others of late,

That the Houſe of Commons originally were no part of the Parliament, at leaſt not as now elected, and conſiſting of Knights, Citizens and Burgeſſes; but that their Beginning was in the forty ninth Year of King *Henry* 3. when that King had given a total overthrow at the Battle of *Eveſham*, to *Symon Montford* Earl of *Leiceſter* and the Barons.

And that to ballance the Power of the Barons, that King cauſed the Knights, Citizens and Burgeſſes to be choſen, and to make a Part of the Parliament.

Dr. *Heylin* in the Life of Archbiſhop *Laud.* Sir *Rob. Filmer.* *Dugd.* in his *Orig. Juridic.* Mr. *Pryn* in his Preface to Sir *Rob. Cotton*'s Abr. (as he conjectures).

And from hence ſome Unquiet Innovating Writers, *quorum res, & ſpes ex adulatione pendent*; and who would deſtroy Foundations, and remove our Ancient Land-marks, and the Ancient and Juſt Limits and Boundaries of Power and Authority; Perſons of neceſſitous Eſtates, or of greedy and ambitious Appetites, which drive them upon deviſing how to do ſome acceptable Service to thoſe that maintain them: Or at the beſt out of unſetled Judgments, and too much Zeal, which carries them to a contrary extream. Theſe Men conclude, That therefore all the Power and Priviledge the Houſe of Commons claims, is not by Preſcription, but that they depend upon the King's Royal Will and Pleaſure, and had their Original by his meer Conceſſion, and not by Ancient Inherent Right, nor Original Conſtitution, and therefore may be reſumed at Pleaſure.

Dr. *Manwaring.*

It was one of the Articles againſt Dr. *Manwaring*, in the Parliament 3 *Car.* 1. for which he was Impeached by the Commons, and Sentenced by the Lords in Parliament;

Pryns Plea for the Lords, 352.

That to Subvert, Scandalize and Impeach the good Laws and Government of this Realm, and the Authority of the High Court of Parliament, *and to avert his Majeſties* Mind from calling of Parliaments, and to alienate his Royal Heart from his People, he did in his Sermons, and in his Books printed, endeavour to perſuade the King,

That his Majeſty was not bound to obſerve the Laws of the Realm concerning the Rights and Liberties of the Subjects:

That Authority of Parliament was not neceſſary for raiſing of Aids and Subſidies.

His

His Sentence was Impriſonment during pleaſure, and but 1000*l.* Fine for this high Offence, not 20000*l.* as hath been of late times.

He was to acknowledge his Offences, as it ſhould be ſet down by a Committee in writing at the Bars of both Houſes.

He was ſuſpended from his Miniſtry.

Diſabled to preach at Court.

His Books were to be call'd in, and burnt in *London* and both the Univerſities.

Power limited by Law is ſafeſt.

It may be thought *Poteſtas minor, ſed tutior & diuturnior. Ea demum tuta eſt Potentia, quæ viribus ſuis modum imponit.*

To encounter theſe new and upſtart Opinions, I ſhall mention an Author or two, whom all ſober men reverence, that are of a contrary Judgment to theſe new Authors. And they are either Eminent Lawyers, or Divines.

King *Charles* the Second.

And I am the more encourag'd to do it, becauſe His Majeſty that now is, hath upon ſeveral occaſions been pleas'd graciouſly to declare, That he holds Parliaments to be the beſt Method for healing the Diſtempers of the Kingdom, and the only means to preſerve the Monarchy in credit at home and abroad; and he promiſes to rule the People by the Law.

Hales, that ſolid learned *Divine*, in his *Golden Remains*, cites *Baldus* for it: *Digna Vox eſt Majeſtate Regnantis, Legibus alligatum Principem ſe profiteri.*

And Learned *Hooker*, that great Champion for the Diſcipline, and for the Rites and Ceremonies of the Church, in his *Eccleſ. Polity*, delivers his Opinion quite contrary to theſe Time-Servers.

Pag. 27. All publick Government (ſays he) of what kind ſoever, ſeemeth evidently to have ariſen from deliberate Advice, Conſultation and Compoſition between men. That Compoſition ſignifies the Laws. And, *pag.* 28. he ſays further, That *the Power of making Laws* to command whole Politick Societies of men, belongs properly to the ſame entire Societies.

What can be ſaid more in confutation of the Book that goes by the Name of Sir *Rob. Filmers?*

The Duke of *Wittemberg*, at the Council held at *Wormes*, when other Princes diſcours'd of many Priviledges and Conveniencies of their Lordſhips and Territories, openly proteſted it to be his greateſt Felicity,

That he could *in aperto Campo, & in Sinu Subditorum ſuorum dormire.*

Non eget Mauri jaculis, nec arcu, &c.

I ſhall further add only the Judgment of one or two of our moſt Famous and Learned Judges concerning this Matter.

Forteſcu

Forteſcu, that was firſt *Lord Chief Juſtice*, and afterwards *Lord Chancellor* in the Reign of *H. 6.* in his excellent Book in commendation of the Laws of *England*, affirms this Doctrine.

Fol. 32. *Ad tutelam Legis, Subditorum, ac eorum Corporum & Bonorum erectus Rex eſt. Et ad hanc Poteſtatem a Populo effluxam ipſe habet.*

Sir *E. C.* in his 12. *Rep.* 64. delivered his Opinion freely in the Caſe of Prohibitions, before the King and the Lords of the Council; where there was a warm Debate between the Judges and Dr. *Bancroft*, Archbiſhop of *Canterbury*. And what Sir *E. C.* deliver'd for Law, was with the clear conſent of all the Juſtices of *England* and Barons of the Exchequer.

And there Sir *E. C.* ſays, it was greatly marvell'd at, that the Arch-Biſhop durſt inform the King, That *the King had an abſolute Power and Authority by the Word of God to determine what Cauſes he pleas'd in his own Perſon.*

And it is admirable to obſerve with what a true and honeſt Courage that grave Chief Juſtice Sir *E. C.* anſwer'd the King himſelf in that Debate. When the King was pleas'd to ſay, It was Treaſon to affirm, that the King was under the Law: The Chief Juſtice anſwer'd him with the Words of an ancient Judge, and Author of our Law (that is, out of *Bracton*) That the King was *ſub Deo & Lege*. And *Fleta*, another of our ancient Authors in our Science, uſeth Words to the ſame effect. This Doctrine differs from ſome of our late *Motto's* in the Serjeants Rings.

Tacitus, in his Annals, gives this excellent Commendation of two of the beſt of the *Roman* Emperors, *Nerva* and *Trajan*: *Res olim inſociabiles miſcuerunt, Imperium & Libertatem.*

And that Author well obſerves it as the true Caſe and Condition of a People, and a neceſſary Conſequence; *Amiſſa Virtute pariter ac Libertate.*

This Diſcourſe of mine may ſeem to ſome to be a Digreſſion; but a man can never have a juſter occaſion for it than now, and upon this Argument and Suit: I make that my Apology, which I learn from King *James*, (His Majeſties Royal Grandfather) in his Diſcourſe of the *Powder-Treaſon*: Which proves it the more ſeaſonable.

Fol. 223. of his Works. *There is a Time* (ſaith King *James*) when no man ought to keep ſilence. It hath (ſays he) been ever held as a general Rule in all well-govern'd Common-wealths, whether Chriſtian, or Ethnicks, That when either their Religion, or their King, or their Countrey was in any extream hazard, no good Countrey-man ought then to with-hold either his Tongue or his Hand according to his Calling or Faculty, from aiding to repel the Injury, repreſs the Violence, and avenge the Guilt upon the Authors.

To

To ſupport the Power and Priviledge of the Houſe of Commons, as being an eſſential part of the Parliament; it is abſolutely neceſſary to make it out againſt theſe Innovators, that the Houſe of Commons have ever been a part of the Parliament, and that they were long before 49 *H.* 3.

The Commons as now conſtituted, began before 49 *H.* 3.

Or otherwiſe they are but precarious in their power and priviledges, and enjoy them but of Grace.

Every Priviledge is by Preſcription, ſays the Lord *Dier*, fol. 60. *a. med.* in *Trewinnard*'s Caſe, which I ſhall have occaſion to mention more at large before I have done.

And in the ſame *Dier*, fol. 70. in the Caſe of *Withers* and *Iſeham*, it is held, That a man cannot preſcribe to an Incident or Appendent, nor indeed to any Power or Authority where the Principal Thing hath not had a perpetual continuance.

Therefore where the beginning of a thing is known, there can be nothing belonging to it by Preſcription.

In one of our late Kings Reigns, the Houſe of Commons in an Addreſs of theirs, made mention of their Priviledges, as their ancient and undoubted Right and Inheritance: But Offence was taken at it, and they were told, it had been better if they had ſaid their Priviledges were deriv'd from the Grace and Permiſſion of the King and his Anceſtors.

Ruſhw. Hiſt. Collec. Part 1. fol. 52.

Now I ſhall clearly prove that theſe Powers and Priviledges were indeed their ancient Right and Inheritance. Which they cannot be unleſs that Houſe, or the Commons by their Repreſentative, have been ever from the beginning of the Governm ent a part and member of the Parliament.

I ſhall prove it out of ſeveral authentick Authors of the Law, Hiſtorians and Antiquaries, and by a multitude of Records, and by divers Acts of Parliament, which are all the ſorts of Proof that can be in a Queſtion of this Nature.

Proof that the Houſe of Commons have ever been a part of the Parl.

The *Mirrour of the Juſtices*, of which Book Sir *E. C.* ſays, That moſt of it was written before the Conqueſt (as appears by the Book it ſelf) *Tho. Horn*, a Learned man, added much to it in the Reign of *E.* 1. in this *Mirrour of the Juſtices*, *c.* 1. *ſect.* 3. It is ſaid that King *Alfred* Ordain'd for a perpetual Uſage, That twice in the Year or oftner, if need be, the Parliament ſhould aſſemble. And to let you ſee of whom that Parliament did conſiſt, he tells us in the ſame Chapter by whom the Laws were then made. It is (ſays he) among other things, ordain'd, that no King ſhould change his Money, nor impair it, nor inhanſe it, nor make any Money but of Silver, without the aſſent of the *Lords* and *All the Commons*.

In his Pref. to his 10th. Rep.

Sir *E. C.* in his Preface to the *9th. Rep.* tells us, That Tenants in Ancient Demeſn, becauſe by their Tenure they were bound to Plow and Husband the Kings Demeſnes, before the Conqueſt: And in the Conquerors Time, had divers Priviledges, which they claimed by Preſcription; and among others, *Not to contribute to the Wages of the Knights of the Shire.*

Now the Priviledge muſt be as Ancient as their Tenure and Service, for their Priviledge comes by reaſon of their Service, and their Service is known by all to be before the Conqueſt, in the time of *Edward* the Confeſſor, and in the time of the Conqueror. And it is expreſly ſaid by this Learned and Reverend Judge, That theſe Tenants, in Ancient Demeſn, claimed this by Preſcription; and it could not be ſo, if the Wages of the Knights of the Shire had begun within Memory of Man, or of any Record. Therefore it clearly follows, That Knights of the Shire to ſerve in Parliament, and the paying Wages to them for their Service, has been Time out of Mind, and did not begin 49 *H.* 3. for that is within Time of Memory in a Legal Sence.

The ſame Argument is uſed by a Learned Lawyer and Antiquary Mr. *Lambard*, in his *Archion*, or Commentary upon the Courts of Juſtice, fol. 57, and 239, and 245. where he maintains that the Parliament was uſed in the *Saxons* time, and then conſiſted of the King, Lords and Commons, as in the time of King *Ina*. *Anno* 712.

He does affirm, That Burgeſſes were choſen to the Parliament before the Conqueſt, *fol.* 257, 258, 265.

Littleton's *Tenures*, *ſect.* 164. ſays, That the ancient Towns call'd Burroughs, be the moſt ancient Towns that are in *Engl.* for the Towns that now are Cities or Counties, in old time were Burroughs, and call'd Burroughs, for that of ſuch old Towns came the Burgeſſes to the Parliament.

Sir *E. C.* in his Comment upon this Text of *Littl.* 1 *Inſt.* 110. ſays, it is called *Parliamentum*, becauſe every Member of that Court ſhould *Parler la Ment.*

Many Pretenders to Learning, take upon them to cenſure Sir *E. C.* for this and ſome other like Etymologies, as being ridiculous.

Let me do right to that Learned in the Law, and (which is more) honeſt and worthy Chief Juſtice, who lives in his uſeful Works, and in (that great Bleſſing from God) a numerous and flouriſhing Poſterity.

It is true, *Mentum* is an ordinary Termination of divers words of the Neuter Gender, and ſo it is (if we will be ſtrict) in the Word *Parliamentum.*

But give me leave to ſay, if it be ridiculous, he is not the firſt nor the greateſt that hath been guilty in this kind; nor is it any proof of Illiterateneſs, nor to be charg'd only upon the Profeſſion of the Common Law, as if it were an Abſurdity peculiar to us.

For

For the Antiquity of the like Etymology, it is of above a thouſand years ſtanding; and for the Authority of it, it is to be met with in the Imperial Laws of *Juſtinian* the *Roman* Emperor, and the laſt of the *Roman* Emperors.

Even in the very Text of the Civil Law, it makes the Etymology of *Teſtamentum*; *Ex eo appellatur* (ſays the Text) *quod Teſtatio mentis eſt.*

Alluſione quadam Etymologica oſtendit rei & vocis convenientiam, (ſays *Vinius*) in his Comment. *fol.* 270.

Nomen ab oſſitio convenienter habet.

And *Vinius* ſays further, *Eſtque hujuſmodi alluſiva derivandi ratio, omnibus Auctoribus admodum familiaris. In jocis Venuſtas delectat; qualis eſt illa* Ciceronis, Fides, *quia* fiat *quod dictum eſt.*

And Sir *E. C.* (it may be) was prompted to this *Etymon* from that ancient Author, the *Mirrour of Juſt.* who, in the place I before cited, *c.* 1. *ſect.* 3. though he did not expreſly mention the Word (*Parliament*) yet ſpeaking of it under another Name, he tells us what their Property is, *viz.* A *Parler la Ment.*

Thus much by way of Digreſſion, for the Vindication of that Honour of our Profeſſion, Sir *E. C.* to whom not only his own, but all Poſterity are highly oblig'd, eſpecially our Profeſſion.

The *Regiſter of Writs*, fol. 261. *Quod homines de antiquo Dominico non contribuant expenſis Militum ad Parliamentum venientium.* This is the Title of the Writ.

The Writ it ſelf runs thus, *viz.*

Monſtraverunt Nobis (ſays the King) *Homines & Tenentes de Manerio de* S. *quod enim de antiquo Dominico Coronæ Angliæ, ut dicitur, quod licet ipſi & eorum Anteceſſores Tenentes de eodem Manerio* a tempore quo non extat Memoria, *ſemper hactenus quieti eſſe conſueverunt de expenſis Militum ad Parliamenta Noſtra, vel* Progenitorum Noſtrorum *Regum Angliæ, pro Communitate dicti Comitatus, venientium*, &c.

M. 11. *H.* 4. *Fitzh.* Avowry, *Placito*, 52. (which is ſaid to be the firſt Caſe in our Year-Books, concerning Wages to Knights of the Shire) In a Replevin the Defendant avows as Under-Sheriff, by vertue of a *Fieri facias*, to levy the Wages of the Knights of the Shire; and he took his Diſtreſs in a Town call'd *Wotton. Tremain*, for the Plaintiff, pleads in Bar to the Avowry, That *W. temps d'ont*, &c. never paid to the wages of the Knights of the Shire; and ſo Iſſue is joyn'd upon that Preſcription.

M. 14. *H.* 8. *fol.* 3. *in the Year-Book*, by *Fineux* Ch. J. The Parliament (ſays he) conſiſts of the King, the Lords and the *Commons*, and they are by the Com. Law *One Body Corporate.*

Now,

Now, that, they cannot be at the Common Law, but by *Preſcription*,

Proof by Records of Parliament.

I ſhall now proceed to prove it by ſeveral Records of Parliament, that the Commons have ever been a part of the Parliament, as conſtituted at this day, of Knights, Citizens and Burgeſſes.

51 *E.* 3.

Ex Rotulo Parliamenti, anno 51. *E.* 3. *Membr.* 5. *num.* 45. Mr. *Pryn*'s 4th. part of a Regiſter of Parliamentary Writs, *fol.* 315. in Sir *Rob. Cott. Abr.* it is too ſhort; but at large in Mr. *Pryn*, as before cited.

There is a Petition of the Commons to the King in *French*.

Item, For that of *Common Right* (which is the ſame with the *Common Law*, in the Language of the Acts of Parliament) of the Realm. Of every County of *England* there were and are choſen two Perſons to be at the Parliament, for the Commons of the Counties, beſides the Prelates, Dukes, Earls and Barons, and ſuch as hold by Barony; and beſides Cities and Burroughs, who ought to chuſe of themſelves ſuch as are to anſwer for them. And ſuch as are choſen for the Counties ought to have their *accuſtomed Wages*, and to have Writs to the Sheriffs to levy them.

They pray that it be ordain'd this preſent Parliament, that the Wages be Levied of all the Commons of the Counties, as well within Franchiſes as without (excepting within Cities and Boroughs, and excepting of thoſe that are ſummon'd by Writ (meaning the Barons) and their Tenants.

Reſp. *Soit fait come devant ad eſte uſe en ceſt Caſe.*

This was in the time of K. *E.* 3. who was but the Fourth King in Succeſſion from that K. *H.* 3. in whoſe Reign our new Authors would have our Knights, Citizens and Burgeſſes to have their Original.

And the Kings Anſwer to the Petition of the Commons, admits the matter of the Petition to be true, and refers to Uſage in former times.

5 *H.* 4. *nu.* 71.

In the ſame Fourth Part of Mr. *Pryn*'s Regiſter, *fol.* 643. 5 *H.* 4. *Rot. Parl. num.* 71, & 78.

On the behalf of *Rich. Chedder* Eſq; Menial Servant to *Tho. Brook*, Knight for *Somerſetſhire*.

The Commons Petition'd, That whereas, *After the Cuſtom of the Realm, all the Lords, Knights, Citizens and Burgeſſes*, with their Servants coming to Parliament, by the Kings Writ, in coming, going and returning, are under your Royal Protection, *&c.* And this Petition was anſwer'd by the Act in Print.

We may note from hence, That their Priviledge, and therefore much more their being a Part of the High Court of Parliament, it was by *Cuſtom of the Realm*. I would

I would note further (ſince I ſhall have occaſion to uſe it for another very material Point) that this Cuſtom (though the then preſent occaſion for the mention of it, was from the Servant of a Member of the Commons Houſe; yet it is alledg'd as one *entire Cuſtom* for the whole Parliament, *viz. all the Lords Knights, Citizens* and *Burgeſſes*. They are all but *One Body*, *One Court*; and their Rights and Priviledges are entire, and not ſome for the Lords, and other for the Commons; but it is a joint Priviledge.

From hence it follows, you cannot invade the Privilege of the one Houſe, but you invade both.

Elſing, in his Treatiſe of Parliaments, *fol.* 145. 'Tis alſo in Sir *Rob. Cott. Abr. fol.* 433. but not ſo full.

In the time of the ſame King, 5 *H.* 4. *num.* 74.

The Commons pray, That whereas according to the *Cuſtom of the Realm*, the Lords, Knights, Citizens and Burgeſſes, coming to Parliament, ought not for any Debate, *&c.* to be arreſted. 5 *H.*4. *n*1.74.

It is ſaid to be the Cuſtom of the whole Realm (that is, the ſame with the Common Law) and it is made to be *one entire Cuſtom*, both for the Lords and Commons; and this is for freedom of Debates, and not the ſame with the laſt that I cited, though in the ſame year.

39 *H.* 6. *Rot. Parl. num.* 9. On the behalf of *Wr Clerk* Burg. of *Chippenham* in *Wiltſh.* Mr. *Pryn*, *ut ſupra*, fo. 771.

And 17 *E.* 4. *Rot. Parl. num.* 36. On the behalf of *J.* at *Will.* Cit. for *Exeter*.

In both theſe Caſes (though upon occaſion of two particular Members) yet the *whole Houſe* of Commons petition'd.

And the Petition on the behalf of *Wr. Clerk*, runs thus;

That, *whereof time that mans mind is not to the contrary, it hath been uſed*, &c. and then ſets forth their Priviledge.

The Petition of the Commons on the behalf of *J. at Will.* is in theſe words, *viz. The Freedom of which Commons* hath *ever* afore this time been, and *oweth* to be, that the Knights of the Shire, Citizens of the Cities, and Barons of the Cinque-Ports, call'd to any of the Parliaments of your Noble Progenitors (*among other Liberties and Franchiſes*) have *had and uſed Priviledge*, that any of them ſhould not be attached by their Perſons or Goods in their coming to any ſuch Parliament, their abiding, nor returning to their proper homes, *&c.*

Their Freedom had *ever* been; then it did not begin firſt, nor had they themſelves their beginning in 49 *H.* 3.

And *oweth to be:* Then it was not of meer Grace, and by Permiſſion, but of *Right* it *ought ſo to be.*

And *Two Acts of Parliament* paſs'd upon thoſe two Petitions, which confirm the truth of thoſe Suggeſtions.

And another thing I would obſerve, which does naturally and eaſily flow from theſe Records, and is very uſeful to us, *viz.*

That the Commons *Petitioning* to have theſe Freedoms allow'd them, does nothing derogate from their Right to thoſe Liberties

and Franchiſes, nor is no Argument to prove them to be meer Emanations of Royal Favour; for the humble way of Addreſs, by the Commons to the King to have their Rights maintained, is made uſe of by our Novelliſts, to prove they were granted from time to time, meerly by the Kings Grace.

Addreſſes to the King ought to be with Reverence.

I am far from condemning this humble way of Subjects addreſſing to their Sovereign: It becomes the Duty of Subjects, and is due to the Majeſty of a King, to have all decent Reverence ſhewn: But I would not have ill uſe made of their Humility, to deprive them of their Rights. It was (as I take it) the obſervation of *Cæſar*, in his Commentary, of the Temper of the old *Britains*, *Jam domiti ut pareant, non ut ſerviant.*

31 *H.* 6. *Thorpes* Caſe.

In that famous Caſe of *Thomas Thorp*, the Speaker of the Commons, 31 *Hen.* 6. *num.* 25. there are the very Words of the Petition, at large ſet forth, in the fourth Reg. of Mr. *Pryn*, fol. 644.

Thorp, was taken in Execution, at the Suit of the D. of *Y.* The whole Houſe of Commons petitioned to have their Speaker reſtored to them: And their Petition is in theſe Words.

By Common Cuſtom, Time out of Memory of Man, *and* ever *afore theſe Times uſed*, in every of the Parliaments *of the* Kings Noble Progenitors, *&c.*

And ſo it proceeds to declare the Priviledge of the Commons.

I would obſerve alſo, out of theſe three laſt Records of Parliament; That when any Breach of Priviledge befell but a ſingle Member of that Houſe, as that of *Walter Clerk*, and *J.* at *Will.*

The whole Houſe thought it ſelf concerned, and the whole Houſe petitioned; eſpecially in this laſt Caſe of *Thomas Thorp*, their Speaker, to whom the D. of *Y.* was no Friend. This will be uſeful to my Second Point.

Hitherto I have preſented you with Records of Parliament, as being the moſt proper Proof of the Rights of Parliament, much beyond the Reports of our Hiſtorians, from whom our Innovators fetch moſt of their Arguments.

Exchequer Records.

I ſhall now offer you ſome Records out of an inferior Court, one of the four Courts of *Weſtminſter-hall*, that is, out of the *Exchequer*: But they are *Judicial Records*, adjudged by the whole Court, by Advice, with all the Judges of both Benches, to confirm the ſame Point.

M. 12. *E.* 4. and *H.* 13. *E.* 4. in the Office of the Pleas in the *Exchequer*, mentioned by Mr. *Pryn*, in his fourth part of his Regiſter of Parliament Writs, *fol.* 752.

In a Plea of Debt by *Donne* againſt *Walſh*.

Walſh was menial Servant to *Henry* Earl of *Eſſex*, and he ſued out his Writ of Priviledg, and the Writ under the Great Seal, was of this Tenure: *viz.*

Cum ſecundum conſuetudinem *in regno hactenus obtentam & approbatam, Domini Magnates Milites Comitatuum ac Cives & Burgenſes Civitatum & Burgorum, ad Parliamenta noſtra venientes, ac*

eorum

eorum Familiares ratione alicujus Tranſgreſſionis (and ſo proceeds to enumerate other ſorts of Actions) *dum ſic in Parliamentis noſtris morentur, arreſtari aut implacitari minime debeant*, &c.

And then the Writ mentions that Action of Debt, brought againſt *Walſh*, menial Servant to the Earl of *Eſſex*, in that preſent Parliament, *Vobis mandamus* (ſayes the King by that Writ of Priviledge to the Barons of the *Exchequer*,) *quod ſi ita eſt.* Thoſe Words do not refer to the Cuſtom ſet forth, nor to the Law upon it, but to the Allegation in the Writ of matter of Fact; *viz.* That *Walſh* the Defendant was menial Servant to the Earl of *Eſſex*.

And then the Defendant does by way of Plea, grounded upon that Writ, apply the Writ to himſelf; and averrs, That he is the ſame Perſon mentioned in the Writ; and averrs, That he was the menial Servant to the E. of *Eſſex*, and then demands allowance of his Priviledge.

The Plaintiff in that Suit traverſes the Cuſtom and Priviledge alledged in the Writ (as to the being impleaded) but admits it as to the Freedom from Arreſt. This Traverſe is in the Nature of a Demurrer; for it is *Quæſtio Juris, ad quam reſpondent Judices non Juratores.*

Et ſuper hoc viſo & prælecto brevi prædicto, per Barones, &c. Habitoque Aviſamento Juſticiariorum Domini Regis, de utroque Banco in hac parte. Quia videtur præfatis Baronibus de aviſamento Juſticiariorum prædictorum, quod talis habetur & habebatur conſuetudo, *quod Magnates & Milites Comitatuum, ac Cives & Burgenſes Civitatum & Burgorum ad Parliamentum de Sumonitione Regis venientes, ac eorum Familiares Ratione alicujus Tranſgreſſionis, &c. dum ſic in Parliamento morentur, capi aut arreſtari non debent.* (But then they adjudge that the Priviledge does hold only againſt Arreſting their Perſons, but not againſt the Suing them.)

This ſtrongly proves the Point I have in Hand, That the Houſe of Commons have their Priviledges by Cuſtom, and therefore the Houſe it ſelf could not have its Original within Time of Memory, as 49 *H.* 3. is, in a Legal Underſtanding.

It is very uſeful further to obſerve, That the ſingle and ſole Occaſion of this Record was from the Priviledge of the Peers, from the ſuing a menial Servant of a Peer. No Man denies but the Peers have ever been a part of the Parliament: Nay, our new Modellers of the Government would have the Parliament to conſiſt only of the King and Lords.

And yet it is ſaid to be a *Joint Cuſtom* for the Commons, as well as for the Lords, by expreſs and particular Words. Why did they not lay the Cuſtom for the Priviledge of the Lords only, that might have ſerv'd for that preſent Occaſion, which was about the Priviledge for a menial Servant of the then E. of *Eſſex*?

But the Cuſtom was an entire Cuſtom for both Houſes: This proves them to be coætaneous, and Twins by Birth and Original.

All this is by the Judgment of all the twelve Judges, in a Judicial Proceeding: And it takes in the Opinion of the Chancellor, who iſſued out that Writ.

The

H. 12. *E.* 4. in the *Exchequer.*

The other Record of the ſame Court is entred *H.* 12. *E.* 4. *Rot.* 7. *inter Ryner & Couſin*, Keeper of the Wardrobe to the King, in an Action of Debt too; and there the Defendant claims his Priviledge, not as Servant to the King, but as Servant to *Thomas St. Leger*, Knight of the Shire for *Surrey*.

And the Writ of Priviledge ſets forth the ſame entire Cuſtom, both for Lords and Commons (tho' the Occaſion was here from the Commons only) and the Court of *Exchequer* gives the like Judgment, as in the former Caſe, by Advice too, of all the Judges of both Benches.

E. 2. *S. Albans.*

The next Record I ſhall make uſe of, ſhall be that of *E.* 2. which is a moſt invincible Proof that the Knights, Citizens and Burgeſſes have originally, and before 49 *H.* 3. conſtituted the Houſe of Commons, and have ever been a part of the Parliament.

The Burgeſſes of *S. Albans*, in their Petition to the King, ſay, That they *ſicut cæteri Burgenſes Regni ad Parliamentum Regis, per duos Comburgenſes ſuos venire debeant, prout retro-actis temporibus venire* conſueverant, *tam* tempore Domini Edwardi, nuper Regis Angliæ, *Patris Regis* (which muſt be *E.* 1.) & progenitorum ſuorum (which muſt be underſtood of the Progenitors in the plural number of *E.* 1. for he mentions the then King *E.* 2. afterwards) ſo that of neceſſity it muſt take in King *Hen.* 3. and his Father King *John*, at the leaſt.

And this Computation much exceeds the Date given to the Houſe of Commons by theſe new Authors, *viz.* 49 *H.* 3.

And then the Petition deſcends to the mention of the then Kings Time, *viz. E.* 2. *tempore Domini Regis qui nunc eſt*, ſemper *ante inſtans Parliamentum.* And the Petition complains of the Sheriff of *Hertfordſhire*, who by the Abbots procuring, refuſed to ſummon that Burrough.

The Anſwer by the Council is, *Scrutentur Rotuli, &c. de Cancellaria, ſi* temporibus Progenitorum *Regis Burgenſes prædicti* ſolebant *venire, vel non.*

This Anſwer admits the general Uſage of Burgeſſes to be choſen for divers Burroughs, in the times of the King's Progenitors; For it is abſurd to think, that that needed any ſearch of the *Rolls* in *Chancery*, but the Search was to be only, Whether that particular Burrough of S. *Albans* was one of thoſe Ancient Burroughs that had uſed that Priviledge, and had a Right to it, which would appear by the Rolls, and Returns of Writs of Summons.

The Record lays the Uſage for the Burrough to have been *ſemper, ante inſtans Parliamentum*; ſo that the Uſage had been from ever.

11 *H.* 4. *n.* 59.

In the Rolls of Parliament 11 *H.* 4. *num.* 59, cited by Mr. *Pryn*, in his *Brevia Parliamentaria rediviva*, *fol.* 185. There is *a Petition of the Commons in French*, reciting the Stat. of 7. *H.* 4. *c.* 15. which Statute (as the Petition ſays) was made for the preſerving the *Franchiſes and Liberties of the Election of Knights of the Shire, uſed throughout the whole Realm, and by the Kings Progenitors from Parliament to Parliament, time out of mind* obſerved.

I will

I will now put the Court in mind of ſome Acts of Parliament, that fully prove this Point.

Proof by Acts of Parliament.

The Statute of 5 *R.* 2. *Parl.* 2. *c.* 4. (in a time When Parliaments were not ſo much valued) *It is thereby Enacted, by Aſſent of the Prelates, Lords, and Commons, that all Perſons and Communalties; which ſhould have a Summons to Parliament, ſhould come from thence-forth to Parliaments in the manner as they were bounden to do, and* had been accuſtomed of Old Times; *otherwiſe they ſhould be Amerced* as of Old Times had been accuſtomed. 5 *R.* 2. *Parl.* 2. *c.* 4.

Rot. Parl. 2 *H.* 5. *Pars* 2. *Numb.* 10. This is left out of Sir *Rob. Cott. Abr.* That Act declares, that the Commons had ever been a Member of the Parliament, and that no Statute or Law could be made without their Aſſent. I will not ſpend time in citing thoſe Learned Antiquaries, or Hiſtorians; as Sir *Henry Spelman*, *Bedes Eccl. Hiſt.* nor Famous *Selden*, nor Learned *Cambden*, who by general Words, uſed in the *Saxon* Times, for the Aſſembling of Parliaments, tho' not by that Name, prove the Commons to be a Part of Them; but they do not prove the Commons to be ſo Elected, and to conſiſt of Knights, Citizens, and Burgeſſes, as is clearly Proved by the Records I have already offer'd. 2 *H.* 5. *pars* 2da. *Numb.* 10. Hiſtorians and Antiquaries.

The Parliament in the *Saxon* Times was ſtyled *Commune Concilium, tam Cleri quam populi.* And the Laws were made *per Commune Concilium, & aſſenſum Omnium Epiſcopor' & Principum Procerum Comitum, & omnium ſapientum Senior' & populor' totius Regni & Populi Conventus.* King *Edward* the Confeſſor Confirm'd the *Saxon* Laws, and made new, ſays *Lambert* in his Book *De Priſcis Anglor. Legibus C.* 8. *fol.* 139. and there 'tis ſaid, all to be done *a Rege, Baronibus & Populo.* Theſe general Words cannot be underſtood otherwiſe, than to include the Commons. *Et Populi Conventus.*

And ſo *totius Regni aſſenſu & omnium aſtipulatione & judicio*, ſays Mr. *Selden*, a Judgment was given concerning *Lanfrank*, Arch-Biſhop of *Canterbury*. The Statute of *Mag. Charta* was made and Confirm'd 9 *H.* 3. which was forty Years before this new Date of the Original of the Houſe of Commons, *viz.* 49 *H.* 3: And it appears by ſeveral Statutes, that *Mag. Charta* was made *De Communi Concilio Regni* ſays one Statute: *Per Commune aſſent de tut le Realm*, ſays another. *Per le Roy, Peers, & Communes de le terre*, ſays another. *Seld. Tit. of Hon. pag.* 702. in a Caſe between the Arch-Biſhop of *York*, and the Biſhop of *Wore.* *Mag. Char.* 9 *H.* 3.

It is worth the while to examin the Grounds of their Opinion, and it will appear how weak they are.

Theſe new Authors affirm, that the Houſe of Commons began to be admitted as a part of the Parliament, not till 49 *H.* 3. Their reaſon is becauſe (as Mr. *Prin* ſays, in his Plea for the Lords *fol.* 182. and in his Preface to Sir *Robert Cott. Abr.*) *The firſt Writ of Summons* of any Knights, Citizens and Burgeſſes now extant is no antienter than 49 *H.* 3. *Dorſo* 10. and 11. And from thence he concludes, that it is moſt apparent, that the Commons had no Place, nor Votes by Election in Parliament, before the End of the Reign of *H.* 3. and Sir *Robert Filmer* is in like manner poſitive in it in his Book call'd The *Freeholders Grand Enqueſt*, *fol.* 18. Object. 1.

and they both cite *Mr. Seld.* and *Camd.* and other Learned Authors, and Mr. *Dugdale* in his *Origines Juridiciales, fol.* 18. follows them in it. It is true Mr. *Selden* in His *Titles of Honour, fol.* 717. towards the end of that *fol.* does take notice that the *Firſt Roll* that they find extant is that of 49 *H.* 3. for the Summoning of the Commons by way of Election ; *but he does not thence conclude*, (as thoſe new Authors do) that this was the firſt time that the Commons came to the Parliament by Election.

But in other places of his Learned Book, he does ſtrongly intimate his Opinion to be that the Commons did very Anciently and long before 49 *H.* 3. make an Eſſential part of the Parliament, and were ſummon'd to it; but in what Form they were ſummon'd, and when they firſt began to be diſtinguiſhed from the *Barones Majores*, *Selden* himſelf ſeems much unreſolved.

Learned Camden does indeed date the Original of the Commons as a part of the Parliament, and as now Elected, from 49 *H.* 3. *fol.* 13. of his *Britannia in the Edit. at Lond. An.* 1600. But let us take notice upon what Authority he does it. He ſays he has it *Ex ſatis Antiquo Scriptore*, but he names not his Author.

Mr. *Seld. fol.* 713. ſays, he could never meet with that Author, and profeſſes he gives little Credit to that Relation, but acknowledges there had been a great Change in the Conſtitution of the Parliament, but ſuppoſes it long before 49 *H.* 3. *viz.* in the time of that King's Father (King *John*) and that it was done by a Law, tho' the Law be loſt, as many Rolls of Parliament were, wherein thoſe Laws were entered.

Fol. 709. And the diſtinction of *Barones Majores & Minores* he ſuppoſes was made by Act of Parliament, about the time when the great Charter of King *John* was made at *Runnymead* viz. 17 *Johannis*. By which Charter, ſome of the *Barones Majores* were ſeverally to be Summon'd to Parliament by ſpecial Writs. And all other Tenants *in capite*, or Tenants by Knights Service were to be ſummon'd by a general Summons directed to the Sheriff of every County.

By this Conjecture, it ſhould ſeem that the Court of Parliament before conſiſted but of one Houſe or Aſſembly. And it is generally held, that at the firſt, from the beginning of the Reign of *William* the firſt, till that Charter of King *John*, all Tenants *in Capite* had a Right to ſit in Parliament. For ſays Mr. *Seld. fol.* 704. *medio folii. Tenere de Rege in Capite*, and *to be a Baron*, and *to have a right to ſit in Councils or Courts of Judgment*, are Synonymies. That great Charter of King *John*, ſays *Seld.* was made by the King and his Barons, & *liberos homines totius Regni*, and that it ſeems firſt made the diſtinction.

But

But Mr. *Seld.* does by no means leave it to K. *H.* 3. or his Son *E.* 1. or to any other King at any time, to ſend his ſpecial Writ of Summons to ſuch of the Barons only, *quibus ipſe Rex dignatus eſt Brevia Summonitionis dirigere.* As Mr. *Camden's* nameleſs Authour taught him, and from Mr. *Camden*, Mr. *Pryn*, Sir *Robert Filmer*, and Mr. *Dugdale* take it up, and ſo propagate that Error. So that this new fancy is wholly grounded upon the Credit of that uncertain Writer, whom Mr. *Selden* could never meet with, and to whom he gave no credit.

The Argument upon this Subject, begins *fol.* 701. in Mr. *Seld. Tit. of Honour*, and is continued to *fol.* 718.

Now the Argument taken from the Rolls of Summons, which are not extant before the time of 49 *H.* 3. is of no weight.

For by the ſame Argument it might be proved, that there was no Parliament from the time of 49 *H.* 3. till 23 *E.* 1. For there is no Roll nor no other Teſtimony left of a Summons for any Knights, Citizens and Burgeſſes, from 49 *H.* 3. till 23 *E.* 1. And yet we know there were no leſs than fourteen Parliaments between thoſe times.

They may as well argue, that there were no Acts of Parliament, nor no Parliament till 9 *H.* 3. when *Magna Charta* was made, becauſe there are no Rolls of them till that time. Whereas it is beyond all diſpute, that there were Parliaments and Acts of Parliament long before, as 4 *Will.* 1. when the Biſhops were brought in to hold by Barony, (as Mr. *Seld.* conceives) and ſome in *H* 1. and others yet extant in Hiſtory, yet the Rolls of them are loſt. This is obſerv'd by the *Ld. Ch. J. Vaughan*, in his *Rep. fol.* 358. in the Caſe of *Thomas* and *Sorrel.*

The Ancienteſt Writ of Summons, that Mr. *Selden* had ſeen for a Peer, was but 6 *Johannis. Tit. of Hon.* 707, 708.

In the next place, theſe late Authors proceed further in their errour, and maintain that the Commons had no further power in Parliament, than what the King and the Lords admitted them unto

Mr. *Pryn's* Plea for the Lords, *fol.* 113. but miſ-paged.

And Sir *Robert Filmer*, *fol.* 40. allows neither Lords nor Commons any Power but by the King's *bare Permiſſion*, and thus they are growing in their Invaſions againſt the Court of Parliament, and impeach one firſt, and the other will follow more eaſily.

And Sir *Robert Filmer* further holds, the Legiſlative Power reſts ſolely in the King, and *fol.* 39. he hath theſe words, *But the truth is* (ſaith he) *The Liberties and Priviledges of both Houſes, have but one and the ſelf-ſame Foundation, which is nothing elſe but the meer and ſole Grace of Kings.*

And Doctor *Heylin*, in his Life of Arch-Biſhop *Laud*, *fol.* 91. denies the Priviledges of Parliament to be the Peoples Birth-Right, but holds them not otherwiſe exercis'd, than by the Grace and Goodneſs of the King.

Mr. *Pryn*, Sir *Robert Filmer*, and Mr. *Dugdale*, lay great ſtreſs upon the diverſity that is in the Writs of Summons, between the Summons for the Lords, and the Summons for the Commons. 2. Object.

That to the Lords (*ſay they*) is *ſuper negotiis prædictis tractaturi veſtrumque conſilium impenſuri.* But that to the Commons, is (*ſay they*) only *ad faciendum & conſentiendum his quæ tunc ibidem de communi conſilio dicti regni contigerint ordinari.*

It is true, that for many years of late, that diſtinction hath been ſo uſed in the Summons, but not conſtantly ſo.

As to this point, I will cite Mr. *Dugdale's*, and Mr. *Prin's* own Books againſt their own Opinion.

49 *H.* 3. The very firſt writ of Summons, which as they ſay is now extant, for the Summmoning of the Commons by Election, *viz.* 49 *H.* 3. runs in theſe words, *Nobiſcum ac cum prædictis prælatis & magnatibus noſtris ſuper præmiſſis tractaturi atque conſilium impenſuri.* Dugd. Orig. Jur. pag. 18.

28 *E.* 1. The Writ, *De expenſis Militum qui venerunt ad Parliamentum venientibus* (ſaies that Writ) *uſque ad Weſtmonaſterium ibidem de diverſis negociis nobiſcum tractaturis.* See Mr. *Pryn's 4th.* part of a Regiſter of Parliament Writs, *fol.* 8.

34 *E.* 1. In Mr. *Ryley's Placita Parliamentaria*, it appears, that as the Summons to the Temporal Lords, *fol.* 318. was *ad tractandum*, and ſo likewiſe the Summons to the Prelates, *fol.* 319. ſo alſo *fol.* 320. it is entred in theſe words, *Mandatum fuit ſingulis Vicecomitibus per Angliam quod de quolibet comitatu duos milites, & de qualibet civitate duos cives, & de quolibet burgo duos Burgenſes eligi & ad dictum Parliamentum venire facerent ad tractandum*, &c.

15 *E.* 2. In the ſame Book, *fol.* 570. *An.* 15 *E.* 2. there is mention of a Writ of Summons, for Knights out of *Wales*, to a Parliament at *York*, *ad tractandum & conſilium impendendum.*

31 *E.* 3. In Mr. *Pryn's Brevia Parliamentaria Rediviva*, *fol.* 274. there is the very Indenture return'd by the Sheriff of *Norfolk* for great *Yarmouth*, *ad tractandum, conſulendum & conſentiendum.*

18 *E.* 2. And *fol.* 68. of that Book, another Writ, *de expenſis militum*, reciting the Cauſe for which they had been Summon'd to the Parliament, *viz. ad tractandum*, &c.

18 *E.* 3. And in the ſame Book, *fol.* 145. it appears that 18 *E.* 3. the Writs to the Sheriffs for chuſing Knights, mention'd what their work was to be, in theſe words, *viz. Nobiſcum, cum prælatis & proceribus prædictis ſuper diverſis & arduis negotiis nos & ſtatum regni noſtri ſpecialiter tangentibus tractaturi & ſuum conſilium impenſuri.*

And *fol.* 147. and 149. the like words in the Writs.

26 *E.* 3. And *fol.* 177. the Indenture return'd by the Sheriff of *Wilt-*
1 *H.* 5. *ſhire*, recites their truſt in the ſame words, and purſues the words of the Writ.

And

And 276. and 283. and 381. Indentures return'd from *Reading*, *Briſtol*, *London*, with the ſame words. And *ib. fol.* 178 and 179 and 291 for *Windſor*, and 365. So that in the Reigns of ſeven ſeveral Kings, and thoſe of the moſt Ancient Kings, there was no ſuch diſtinction in the Writs of Summons. 2 *H.* 4. 25 *H.* 6. 16 *E.* 2. 27 *H.* 6.

Another Argument uſed by theſe late Authors, to prove that the whole Power and all the Priviledges of the Houſe of Commons, are not from the Original Conſtitution of the Government, (as I Affirm, and I hope have proved they are) but of a later Original, and by the meer Grace and Indulgence of Princes (as indeed they muſt be, if the Houſe of Commons began within Memory) is taken *from the Words and Phraſes of our Hiſtorians*, who have written ſince the coming in of the *Normans*, and aſcribe the making of Laws, and all the Determinations and Decrees in Matters of Judicature, and all the Actings of the Ancient Parliaments before the time of the *Normans*, to the King and Lords only, Excluſive to the Commons, and that the Commons had no part in them, till this time of 49 *H.* 3. Object.

And they ground this Opinion upon the Form of Penning of our Ancient Acts of Parliament, which ſeem by the Words of them to be meer Conceſſions of our former Kings, and to have proceeded only from their Royal Bounty, and at their ſole Will and Pleaſure. Pennings of Ancient Acts of Parliament.

And they Confirm themſelves in that Opinion, from obſerving the Courſe uſed in the beginning of Parliaments, when the Speaker makes his humble Petitions to the King for the Granting of them Freedom from Arreſts, and Freedom of Speech. Petitions for Freedom of Speech, *&c.*

Now to diſcover the Falſity of theſe Grounds, and the Weakneſs of theſe Arguments, taken from the Words and Phraſes us'd by our Hiſtorians, I ſhall ſhew that our Hiſtorians who have written ſince the time of the coming in of the *Normans*, and have Tranſlated the *Saxon Annals*, have in thoſe Tranſlations, inſtead of the *Saxon Titles*, uſed the Titles that were never in uſe before their own Times, which Titles uſed in the *Saxons* times had quite *different Significations* from the Titles uſed in the times of the Tranſlators.

The Title (*Earl*) for Example, is uſed in the Penning of the *Saxons* Laws (as among thoſe of *Athelſtan*) as we may ſee by Mr. *Lambert* in his Book *de Priſcis Anglor. Legibus*, and the Title (*Comes*) came in amongſt us ſince, from the Empire; and ſignified a different thing from (*Earl.*) Now our Tranſlators miſtaking thoſe two Titles (*Earl*) and (*Comes*) to ſignifie the ſame thing, wherever they met with (*Earl*) in the *Annals* of the *Saxons*, they have rendred it (*Comes*) in their Tranſlations: and whatever in thoſe times was done by *Earls*, and whatever Power the *Earls* then uſed, is by our Tranſlators aſcribed to our *Comites*, who are therefore alſo called *Earls*, when in Truth they had different Significations, and were different in their Powers. Mr. *Selden* takes notice of this Error in our *Norman* Tit. of Honour *Fol.* 603, 604.

or *Engliſh* Tranſlators proceeding from their Ignorance. But from this Error falſe Concluſions have been raiſed, and falſe Meaſures taken in our Diſcourſes, concerning the Power of the Peers.

Sir H. Spelman obſerves the ſame Error in our Tranſlators, in rendring Words and Titles *Non è more Sæculi antiquioris*, but according to the Titles uſed in their own times, when many times they ſignified different things. *Nobilis*, ſays Mr. *Selden*, in the *Saxons* times denoted every Gentleman. Fol. 603.

Now becauſe (*Nobilis*,) in our times is generally reſtrain'd to Peers, whom we call the (*Nobility*,) our New Writers, as Mr. *Pryn*, and Sir *Robert Filmer*, and ſeveral others, aſcribe all to the Earls and Barons and other Peers of our times, which they read in the Tranſlations of the *Saxon Annals*, to be acted by thoſe that are called (*Nobiles*) in thoſe *Annals*. Altho' in truth in thoſe *Saxon* times, they were acted by the middle ſort of Perſons, as well as by thoſe of the higheſt ſort of Dignity under the King.

Thoſe Tranſlators miſled our new Authors. For the *Norman* Writers tranſlate the Word (*Thanes*) into (*Barones*) and theſe new Authors of ours, whatever they find in theſe Tranſlations to be related of the (*Barones*) they limit it as a Peculiar to our preſent (*Barons*) and ſo aſcribe all judicial Power antiently uſed in Parliament to the *Barons* only. And they bring thoſe Hiſtorians and Tranſlators for a Proof.

For Example, The *Saxon* Title (*Thanes*) was in the *Saxon* times applyed to all Lords of Mannors. But the Tranſlators of the *Saxon Annals*, tranſlating the Title (*Thanes*) into (*Barones*) Our Innovators apply all that in *Saxon* Writers is ſaid to be done by the (*Thanes*) that is, all Lords of Mannors, as peculiarly belonging to the Power of the *Barons* in our times.

Hence it is that Sir *E. C.* cautions us againſt taking Reports of Law from Hiſtorians: in his Preface to the 3*d. Rep.* he calls it Chronicle Law.

The Word (*Baro*) was not in uſe in *England* till the *Normans* times, and the Root of it (as Mr. *Seld.* and *Camd.* and Sir *H. Spelm.* teach us) is from the Northern Language (*Barn*) which ſignifies the Male Sex, as when we put Caſes of *Baron* and *Feme*; or it ſignifies (a *Freeholder*) hence come the Words *Courts Baron*.

Nomine Baronagii (ſays *Camd. Eliz. Edit. Lond. An.* 1600. *fol.* 137.) *omnes quodammodo Regni Ordines continebantur.* It comprehended the Gentry as well as the greateſt Perſons. After this manner *Godwin* in his *Roman Antiquities* ſpeaking of the Roman Magiſtrates, Tranſlates the Words (*Triumviri capitales*) into (3. *High Sheriffs*) but this affords no Argument, that what was done by the *Triumviri* among the *Romans*, may therefore lawfully belong to the power of High Sheriffs among us. Fol. 176.

And

And ſo the Words *Proceres*, *Magnates*, *Optimates*, *Nobiles*, and ſuch like, were not in the Writers of the *Saxons* times reſtrain'd to Men of the higheſt rank then, ſuch as our Earls and Barons are now, but to all Perſons of the better ſort, tho' not of the higheſt rank, not only to *Patricians*, and thoſe of the *Senatorian* order, but to thoſe alſo that were *Equeſtris ordinis*. Excluding none but the *Ignota capita*, or *ſine Nomine turba*, ſuch as the *Romans* ſtyled *Plebeians*. *Magnates & Proceres*, are ſaid to make the Stat. of *Mortmain*, but we all know that the Parliament that made it, conſiſted then of King, Lords, and Commons.

The great Charter made 17 of K. *John* appears by the body of the Charter it ſelf to have been made *per Regem, Barones, & liberos Homines totius Regni*; ſo that it is moſt plain it was not made by the King and the Barons only, as Mr. *Seld.* obſerves in his *Tit. of Honour, fol.* 709. and there he refers to the *Cloſe Rolle* 17 *Johannis dorſo memb.* 22. Yet K. *H.* 3. ſpeaking of this Meeting, calls it *Baronagium Angliæ*, and *rot. clauſ.* 28 *H.* 3. *Pars unica membr.* 12. *dorſo*, it is call'd *Parliamentum de Runni-meade quod fuit inter Dominum Regem Johannem & Barones ſuos Angliæ.*

As for the other groſs miſtake, *That the Power of making Laws reſts only in the King*, (as Sir *Robert Filmer* would have it,) which he proves from the Titles of Acts of Parliament, and the Forms of thoſe Acts being by way of Charter and Grant from our Kings in ancient times, as that of *Magna Charta DOMINUS REX CONCESSIT*; and the Stat. *De donis conditionalibus*, *DOMINUS REX ſtatuit*, ſure he was no Lawyer that uſed this Argument, and he never read the Prince's Caſe. The Freeholders grand Enqueſt. *fol.* 40. & 41.

Nor Sir *E. C.* 2. *Inſt.* nor ſhall I need to labour in the confutation of this Errour, the fallacy of it being ſo well known to every Man that wears a Gown. As for that Stat of *Mag. Char.* whereby the King only ſeems to ſpeak, and all that is ordain'd by that Stat. runs in the language of the King's Conceſſions only; yet we know the Stat. of 15 *E.* 3. *c.* 1. which confirms it, ſays of it, that it was ordain'd by the King, Lords, and Commons. The Stat. of 28 *E.* 1. *c.* 8. and *c.* 13. hath theſe words, *viz. The King hath granted unto his People that they ſhall have Election of their Sheriffs every year, if they liſt.* One would take this to be a moſt gracious Liberty, and an high Condeſcenſion if it ſhould be granted now a-days. 28 *E.* 1. *c.* 8. & 13. *Elect.* of Sheriffs.

And our Innovators would be apt to conclude from the words of this Act and from the Penning of it, that the People once had this mighty Priviledge meerly as a Boon from the King, and by virtue of his Grant. Whereas there is nothing more certain and clear than that the Freeholders (who are often call'd the People, and are the true Proprietors of the Nation and Land) had originally and from the very

very firſt Conſtitution of the Nation, the *Election* not only of all *Sheriffs*, but of all other Magiſtrates Civil or Military that had any Authority over them under the King; ſo that they had a mighty Freedom in the very Conſtitution of the Nation, and this overthrows all the wild Fancies of Sir *Robert Filmer*, and Dr. *Heylin*, and ſome later Doctors, as if all were deriv'd from meer Grace and Bounty, and many other Deductions might be made from the knowledge of this.

The Freeholders had originally the Election of the *Conſervators of the Peace*, who are become out of date by introducing our preſent *Juſtices of Peace*, who have their Power not by the Elect. of the Freeholders, or are they of their Nomination (as anciently) but nominated by the King, and have their Power by ſpecial Commiſſion under the great Seal; and how, and by what means, and in what tempered times this came about, and that this freedom was gain'd from the Freeholders of *England*, you may read in Mr. *Lambard*, in his *Eirenarcha*, *fol.* 16. 19. 20. 147. It was done by Act of Parliament, in the beginning of K. *E.* 3*d*, and in his Infancy, when his Mother Q. *Iſabel* ruled all.

The Freeholders originally and from all antiquity did likewiſe by Writ at the County-Court ſtyled *in pleno Folkmote* chuſe the *Heretochii*; What were thoſe? that ſounds like a ſtrange word. I will imitate our *Norman* or *Engliſh* Tranſlators in the tranſlation of the *Saxon* Annals, and render it into the *Engliſh* ſtyle: you may by that rule call them *Lords Lieutenants*, or *Deputy Lieutenants*; for the *Saxon* Laws tell you their duty or office, they were the *Ductores Exercitus*.

See *Lamb. de priſcis Anglor. Legibus*, in his *ch. de Heterochiis*, *fol.* 147.

All theſe great Officers were choſen by the Freeholders, as our Knights of the Shire are, and as Coroners and Verderers (formerly Men of great Power) are choſen by Writ at the County-Court to this day.

Theſe were mighty Powers and Freedoms, and enjoyed by the People as anciently as any of our Records reach, and are more authentique Proofs than the writings of Hiſtorians, and beſt ſhew the Native Freedom that the People had by the ancient Conſtitution of our Government, contrary to all the new Doctrines of our late Writers, and prove that the Priviledges and Freedoms we yet enjoy are not meer Emanations of Royal Favour, as our Novelliſts would impoſe upon us.

See Sir *E. C.* to this purpoſe. 2. *Inſt.* 174. & 558.

I could name ſome great Men that have lately uſed the ſame language in Books publiſh'd *ſub magni Nominis umbra*. *Bracton* who liv'd in the time of K. *H.* 3. *l.* 1. *c.* 1. *fol.* 1. affirms *Legis vigorem habet quicquid de conſilio & conſenſu magnatum & Reipub. Communi ſponſione (authoritate Regis præcedente) juſte fuerit definitum & approbatum.*

The late E. of *Clarend.* in his Anſw. to *Hobs.*

In

In the laſt place, that humble and modeſt way of the People's addreſſing to their Sovereign either for the making of Laws (which has been very ancient)or for granting of Priviledges(as the Speaker of the Commons hath of late years done) it ſhews indeed great Reverence, and I do not in the leaſt diſlike it; and it becomes the Majeſty of the Prince to be ſo addreſs'd to; but let it not be made an argument that either the Laws thereupon made, or the Priviledges ſo allow'd, are precarious, and meerly of Favour, and may be refus'd them.

I would be loth to pay Wages and to maintain at my Charges every one that ſtyles himſelf my humble Servant.

In that Act of Parliament Intituled, *The Petition of Right*, the Title corrects and qualifies it ſelf, 3 *Car.* 1. the Lords and Commons petition'd the King, but it was for their *Rights and Priviledges*; not for any *new*, but for their *ancient Rights and Priviledges*, and yet they ſtyle it a *Petition*. Petition of Right 3 *Car.* 1.

In the Title of this Act (the Petition of Right) thoſe *res olim inſociabiles*, ſc. *Imperium & Libertas* are *bene mixtæ*: and from hence is a mixt Monarchy.

In the Stat. of Proviſors, 25 *E.* 3. the Commons *prayed*; they are fond of the word, and I commend it in them; but the word was uſed by the Figure *Catachreſis*, as the Scholars call it; not properly, as appears by the Subject matter of that Act that follows; what was it, I pray, that they ſo *prayed*? They prayed (ſays that Act) That upon the miſchiefs that happen to the Realm, the King *ought*, and is *bound by his Oath*, with the *accord of his People* in his Parliament, thereof to make Remedy and Law. The Peers are here included in the *People*; ſo that the word *prayed* had it been uſed to any other than the King, had ſignified *remonſtrated*, *declared*, or *repreſented*. Stat. of Proviſors 25 *E.* 3.

This proves too where the tranſcendent Power of the Legiſlature is, and that the Exerciſe of it, tho' it be free and not ſubject to coercion, yet it is not at will and pleaſure in the Exerciſe of it, but guided by Rules.

And tho' the Speaker does (upon his being approv'd of by the King) make it his humble Petition to have Liberty of Speech allow'd the Commons; from whence Dr. *Heylin*, and Sir *Rob. Filmer*, and others, infer that the Commons enjoy that Liberty meerly by the King's Grace and Favour; yet they are clearly anſwear'd by the words that accompany that humble Petition, he prays they may be allow'd that Freedom, *as of Right and Cuſtome* they have *Uſed*, and all their *Antient* and *Juſt Priviledges* and *Liberties*. So that this from the Speaker is alſo a Petition of *Right*. Mr. *Pryn*'s Plea for the Lords, 389, 390.

Nor is this requeſt of the Speakers antient in the uſe of it, if we may believe Mr. *Hakewel*, in his Treatiſe of the manner of Enacting Statutes in Parliament, *fol.* 136.

Thomas Moyle Speaker, 34 *H.* 8. the firſt that is recorded to have made Petition for Freedom of Speech.

I hope I have ſufficiently made it out, that the Houſe of Commons as a Member of the High Court of Parliament, are not of ſo late an Original, as 49 *H.* 3. but have been as Antient as the Nation it ſelf, and may in the Sence of *Julius Cæſar* in his *Comment.* be accounted among the *Ab-Origines*, and that they have had a perpetual Being, to ſpeak in the Language of the Law, *temps dont, &c. à tempore cujus contrarii memoria hominum non exiſtit*, and that they are therefore capable by Law (together with the reſt of the three Eſtates in Parliament) to preſcribe and claim a ſhare in all Parliamentary Powers and Priviledges; I do not mean ſeparately, but in conjunction with thoſe other Eſtates, which they could not otherwiſe legally have done, if their Original and Commencement could have been ſhown.

All three Eſtates one entire Body and Corporation.

I ſhall in the next place endeavour to make it evident, That the three Eſtates of Parliament are one entire Body and Corporation; and that all their Powers and Priviledges in the *Right* of them, and in the Title to them, are intire, *per my & per tout*, and belonging to the whole Body of the Parliament, tho' in the *Exerciſe* of thoſe Powers, and ſometimes in the claim of them they are diſtinguiſh'd, and in the practice of their Powers, they are in many things diſtributed into parts.

For their *Powers* are one thing, and their *Priviledges* are another; the latter are but an incident or attendant upon the former.

It is very material in our preſent caſe to have this matter conſider'd, I mean the Intireneſs of this High Court; for *Divide & Impera:* The Faggot is eaſily broken when firſt the Band is broken. If this be well conſider'd, the conſequence of this Caſe will be better underſtood.

It concerns the Defendant only by name and more immediately, but in the right and near conſequence, it is now moſt evident, that it nearly concerns the Houſe of Lords: this Information of Mr. *Attornies*, like a *Terræ-motus*, or as that great Blaſt would have done (had not Almighty God, in his Infinite Goodneſs to this Nation, prevented it) ſhakes the Foundation of both Houſes, and reaches to all future Parliaments; it frights me to ſpeak what may be the effects of it, if it ſhould prevail and be ſtretch'd to the utmoſt. I am far from ſaying or thinking it is ſo intended. But who knows how far a ſingle Precedent will be made uſe of in times to come?

14 *H.* 8, 3. *Fineux Ch. Juſt.*

All the Eſtates, in Parliament, are all called by one common name, as *Commune Concilium Regni*, *Magna Curia*, They are one *Body Politick*, *M.* 14 *H.* 8. *fol.* 3. in the year-book (which I cited before to another purpoſe) it is ſaid by *Fineux Ch. J.* that the Parliament *at the Common-Law*, conſiſts of the King, Lords, and Commons, and they are (*ſaies he*) but *one Body Corporate.*

This proves likewiſe (what I before argued) that the Commons at the Common-Law (which is *ab initio*) were a part of the Parliament.

In

In the Caſe of *Ferrers* out of *Crompt. Juriſd.* of Courts, *fol.* 8, 9, 10. (for I keep within my proper Element, and move in my Sphere, and cite Authors of our own Science of the Common-Law) K. *H.* the 8*th.* call'd before him the Lord Chancellor, the Judges, the Speaker of the Houſe of Commons, and others, and thus expreſs'd himſelf before them, *viz.* That he was inform'd by his Judges, that he the King as Head, and the two Houſes as Members, were knit together in *one Body Politick*, ſo as whatſoever Offence or Injury (during time of Parliament) is offer'd to the meaneſt Member of the Houſe, is to be judged as done to the King's Perſon and the *Whole Court of Parliament*. And Sir *Edward Mountague* the *Ld. Ch. J.* then preſent, confirm'd all that the King had ſaid, and it was aſſented to by all the reſt of the Judges. Now if you bruiſe or pierce the hands; (and the Houſe of Commons may well be compar'd to the hands, for they have been the Liberal Hands, and the Hands feed the Head) the Head and all the reſt of the Body muſt quickly be ſenſible. *Ferrer's* Caſe, *Crompt. Juriſd.*

In *Trewinnard's* Caſe, *Dier.* 60. and 61. The Priviledge of the Commons upon this very account, is term'd *the Priviledge of the Parliament*, and the Judgment given in that Caſe by the Houſe of Commons, is there ſaid to be *the Judgment of the moſt High Court of Parliament.*

The Statute of 1 *Jac. C.* 1. ſaies the Parliament is *the whole Body of the Realm.*

By the two Records that I cited before out of the Office of Pleas in the Exchequer, 12 *E.* 4. It appears in two ſeveral Caſes of Priviledge, the one concerning the Lords, and the other concerning the Commons, in both Caſes the Priviledge was laid and claim'd as *one entire Priviledge*, and ſo allow'd by the Judgment of that Court, by advice of all the Judges of both Benches.

The Speaker of the Houſe of Commons, by the Rolls of Parliament, (which are the moſt proper proofs in a thing of this Nature) is term'd *the Speaker of the Parliament*, ſo it is in the Roll of 1 *R.* 2. in Sir *Robert Cotton's Abr. fol.* 155. it was in the Reign of a King that was no favourer of Parliaments. Sir *Pierce de la Mare.*

Sir *John Buſſey*, *Speaker to the Parliament*, Sir *Robert Cotton's Abr.* 20 *R.* 2. *num.* 14 and 15.

51 *E.* 3. *num.* 87. Sir *Robert Cotton's Abr. fol.* 151. Sir *Thomas Hungerford Speaker of the Parliament.*

And ſo is the Speaker of the Commons ſtyled in the Caſe of *Ferrers* in *Crompton's Juriſd. of Courts*, *fol.* 8, 9, 10. (before cited.)

In the Statute of 6 *H.* 8. *C.* 16. the Clerk of the Houſe of Commons, is called *Clerk of the Parliament.*

In the Caſe of *Godſol* and Sir *Chriſt. Heydon*, 12 *Jac.* in *B. R.* in Sergeant *Roll's Rep. fol.* It was affirm'd by Sir *E. C.* that in antient time *all the Parliament ſate together*, and the ſeparation

was

This is contradicted by Mr. *Pryn*, in his Preface to Sir *Rob. Cotton's Abr. fol.* 5, 6.

was at the desire of the Commons, notwithstanding *(saies he)* they are but *one house*: and he further affirms, that he had seen a Record, 30 *H.* 1. of their Degrees and Seats.

Having made it appear that the Parliament is one intire body, and therefore mutually concern'd in Powers and Priviledges as to the Right and Title of them, tho' divided sometimes in the Exercise. I shall proceed briefly to show what those Powers are, in order to the proving that what in our Case is charg'd to be done by the Speaker, by Order and Command of the Parliament, (for so I may now affirm) is pursuant to their Power and Jurisdiction.

The Powers of Parliament.

The Parliament hath three Powers.

Of the Power and Jurisdiction of the Parliament.

1. A Legislative, in respect of which they are call'd *the three Estates of the Realm.*

2. A Judicial, in respect of this 'tis call'd *Magna Curia*, or the High Court of Parliament.

3. A Counselling Power, hence it is call'd *Commune Concilium Regni.*

For the proof of these, I shall cite some few Antiquaries, but chiefly some Authors of our Profession of the Law, and those of the best Authority with us.

I shall mention them without observing any exact method, because divers of them extend to more than one of these distinct Powers, and some of them refer at once to all of them.

Sir *Henry Spelman* in his *Glossary Tit. (Gemotum)* which was the old *Saxon* word for a Parliament, *fol.* 261. *Convenere* (saies he) *Regni Principes tam Episcopi quam Magistratus* (there are those that now make up the House of Lords) *Liberiq; homines* (there are the Commons) what is their proper Work and Power? *Consulitur de communi salute, de pace & bello.* This proves them the *Commune Concilium Regni.*

Learned *Camden.*

Quod Saxones olim Wittena Gemot *nos Parliamentum recte dicimus*, as to their Power, *Summam & Sacro-sanctam authoritatem habet in legibus ferendis, interpretandis, & in omnibus quæ ad reipubl. salutem spectant.* This shews their *Legislature.*

The Mirror of Justices, (this is an Authority in Law) *C.* 1 *fol.* 9. saies, Parliaments were instituted *Pur oyer & terminer*; this is is the Supream Court of *Oyer and Terminer.* The Court of King's Bench is said to be above all Courts of *Eire* or *Itinerant*; and if the King's Bench be adjourn'd into any County, where the *Eire* is sitting, the *Eire* ceases, *In præsentia Majoris*, &c.

But this Court is above the King's Bench and all Courts of *Oyer and Terminer.* The King's Bench is the Highest *Eire*, but this is (according to *Solomon's* Hyperbole) *higher than the highest.*

But what is the proper Subject of their *Oyer and Terminer?* Our Antient Author (who wrote some part of his Book before the Conquest)

Conqueſt) tells us their work is to hear and determine *les plaintes de tort le Roy, de la reign, & de leur Enfans,* (the King's Children) ſo that they make an *Impartial* Enquiry, but ſaies our Author further, *De eux ſpecialment de queux torts lun ne poit aver autrement common droit,* this flies very high to prove their *Judicial Power.* I forbear to Engliſh it.

It is the proper work of this Supream Court, to deal with ſuch Delinquents, as are too high for this Court of the King's Bench or other ordinary Courts. Againſt whom, through their Potency or mighty Intereſt, common right cannot be had, it muſt be underſtood in ordinary Courts. And the Writing and Printing of this, was never taken to be a Scandal to the Government or to the Juſtice of the Nation. For the Author ſpeaks in the Perſon of the King himſelf, and tells us, that the High Court of Parliament is arm'd with a Power, able to cope with and quell the moſt inſolent Offenders.

When the Great Judge of all the Earth comes to make Inquiſition for Blood, and to Execute Judgment by the hands of this High Court. *The lofty looks of man ſhall be humbled, and the haughtineſs of men ſhall be bowed down and made low.*

To diſcourſe of this Judgment, will make *a Fœlix tremble.*

We have often heard it confidently ſaid from the Pulpit. That our Laws are like the Spiders Webs, which catch the little Flies, but the great ones break through them.

Now it is quite contrary with this great Court, this great Court encounters only with great Offenders. It is like the Imperial Eagle, *Aquila non capit Muſcas,* it leaves them to this and other Inferiour Courts, but that takes to task the *Animalia Majora.*

In that great Caſe, *Rot. Parl.* 40 *E.* 3. *num.* 7. King *John* had reſign'd up the Crown of *England* to the Pope, by the hand of *Pandolphus* his Legate, and ſordidly ſubmitted to take the Crown at his hand again, at a yearly Tribute.

In the Reign of our noble King *Edward* the 3*d.* the Pope demanded his Rent and all the Arrears.

The Prelates, Dukes, Counts, Barons, and Commons, reſolv'd that neither the King nor any other, could put the Realm nor the People thereof into ſubjection, *ſans l'aſſent de eux.*

This intimates, that with their joint conſent the Crown may be diſpos'd of.

This was the higheſt Reſolution in Law, in one of the higheſt points in Law, concerning the King's Claim of an Abſolute Power, and in a time when the Pope was in his height. And the Commons join in the Reſolution, both againſt the Pope's and King *John*'s pretence to a Deſpotick Power.

Sir *Tho. Smith* who was a Secretary of State, in his *Commonw. l.* 2. *c.* 2. *fol.* 50, 51.

In Comitiis Parliamentariis poſita eſt omnis abſolutæ poteſtatis vis (taking in the King as the Head of them, as it ought to be underſtood)

ſtood) this ſhows where the rightful abſolute Power under Almighty God is. And among other *Magnalia* he tells us, *Incerti Juris Controverſias dirimunt.* This ſhews their tranſcendent *Judicial Power*; they determine the greateſt Diſputes and Doubts in Law. They would quickly decide this Diſpute and Controverſie, (were it once before them) without Argument.

This appears to be the proper buſineſs of a Parliament, even from the Writ of Summons both to Lords and Commons, (for they did not Anciently differ in any thing material (as I have abundantly ſhown already) they are *De Arduis Regni tractitare, & Concilium impendere,* here is their Councelling Power. According to that Equitable Rule, *Quod omnes tangit, ab omnibus tractari debet.*

Their *Legiſlative Power* is moſt clearly ſet out by *Bracton* (a Judge in the time of *K. H.* 3*d.* in whoſe latter times our Innovators would have the Houſe of Commons to begin) I cited him before; *Legis vigorem habet* (ſays he) *quicquid de Conſilio & de Conſenſu Magnatum & Reipubl. communi Sponſione (anthoritate Regis præcedente,) juſte fuerit definitum & approbatum 5 H. 4. Num.* 11. The Record there uſes too groſs a Word. The Commons (ſays the *Roll*) *require* the King, it ſhould have been, made it their Requeſt to the King (and the Lords accorded) that four *ſpecial Perſons* ſhould be *remov'd out of the Kings Houſe.*

This in ſome Ages, as in the Reign of *K.* R. the 2*d.* would have been thought a very high preſumption, and a ſawcy thing (to ſpeak in the Language of the Pulpit, and Preſs too from a late *Cambr. Dr.* and a Chaplain in Ordinary, (if the Title of the Print may be credited) but ſaid to be printed by the——— of that Univerſity. A ſawcy thing with their Prophane and Unhallowed Hands to preſume to meddle in a thing ſo Sacred. (Thus ſays the late Printed Sermon) *But it was a Sacred or Conſecrated thing indeed in this Roll of Parliament mention'd.* One of the 4 required to be remov'd out of the King's Houſe, (where he was a Domeſtick) was no leſs than the King's Confeſſor. And it was not in the Reign of a *R.* the 2*d.* or *H.* the 6*th.* but of *K. H.* 4*th.* one of our Wiſeſt and moſt Active Valiant Kings.

But it may be thought that theſe four Perſons were in ſome deſperate Popiſh Plot of killing the King, as the four we have heard of, were.

No, the King himſelf will reſolve that Doubt.

That noble King ſaid in anſwer to it, *He knew no cauſe wherefore they ſhould be remov'd, but only for that, they were hated of the People.*

And yet that great King charged thoſe Four to depart from his Houſe.

This proves their Councelling Power.

I might enumerate a vaſt multitude of *Animalia Majora,* no ſmall Flies, that have in ſeveral Ages been catched in the Net or Webb of an Inquiry made by the Houſe of Commons, who

fiſh

fiſh only for ſuch greater Fiſh, ſuch as we call the Pike, who by Oppreſſion live upon the ſmaller Fiſh, and devour them. The Commons to that end fiſh with a Net, that has a wide and large Meſhe, ſuch as lets go the ſmall Frye, and compaſſes none but thoſe of the largeſt ſize. Such as the *Lord Latimer* in the time of *E.* 3. *An.* 50. Such as *Michael de la Pool E. of Suff. and Lord Chancellour, in* 10. *R.* 2. *Tho. Arundel Archbiſhop of Canterbury.* 21 *R.* 2. and ſuch like. *William de la Pool D. of Suff.* 28 H. 6. who were all impeach'd by the Houſe of Commons in ſeveral Parliaments.

And I my ſelf have ſeen a Lord Chief Juſtice of this Court, while he was Lord Chief Juſtice, and a Learned Man, by leave from the Houſe of Commons, pleading before that Houſe for himſelf, and excuſing what he had done in a Tryal that came before them in the *Weſt*, whereof Complaint was made to the Houſe. And he did it with that great Humility and Reverence, and thoſe of his own Profeſſion and others, were ſo far his Advocates, as that the Houſe deſiſted from any further proſecution.

In the the late Act of 13°. of his now Majeſty for ſafety of his Royal Perſon, there is a *Proviſo* for the ſaving of the Juſt *Antient* Freedom, and the Priviledge of either of the Houſes of Parliament, or any of their Members, of debating any Matters or Buſineſs, which ſhall be debated or propounded in either of the ſaid Houſes; or at any Conferences or Committees of both, or either of the ſaid Houſes; or touching the Repeal or Alteration of any old, or the preparing any new Laws; or the *Redreſſing of any publick Grievances.* I obſerv'd but now out of *Trewinn.* Caſe in the *Ld. Dier.* that the Judgment of the Houſe of Commons in a Caſe of the priviledge of that Houſe, in that Report, is called a Judgment of the moſt high Court of Parliament; which proves they are not without *a Judicial Power.*

3 *H.* 6. Sir *Rob. Cott. Abr. fol.* 574. The great Caſe between the *E.* of *Warwick* and the Earl *Marſhal* for Precedency, *fol.* 576. was determin'd by the King. *By Advice and Conſent of the Lords and Commons*; and yet one would have thought that a Caſe of Precedency between two Peers, ſhould have been a peculiar of the Lords.

In the Caſe of 1 *H.* 7. in the Year Books, *fol.* 4. about reverſing of *Attainders*, it is advis'd *by all the Judges*, that thoſe Knights and others of the Houſe of Commons, ſhould not ſit in the Houſe, till the Act for reverſal of their *Attainders* were paſs'd. And the Reaſon is, that it is not convenient, that ſuch as were attaint ſhould *be Judges*; (and it might have been added *in their own Caſe*) ſo that attainting by Bill, or Reverſing *Attainders*, tho' by Bill, is moſt properly a Judicial Act, and the Members of the Houſe of Commons are acknowledged to be *Judges* in that Caſe *by all the Judges*, and by that Statute of 6 *H.* 8. *C.* 16. which I mention'd before to another purpoſe, *the Journal of the* Houſe of Commons is call'd a *Record.*

I have formerly obſerv'd, but to another purpoſe too, that the Writs of Summons anciently for Electing Knights, Citizens and Burgeſſes to Parliament, did direct them in their Duty, that they were to meet *ad Conſulendum & Conſilium impendere*, tho' of late Years this has been omitted, and now advantage is taken of it.

Nothing acted in this preſent Caſe, but what is within their Power.

Let us in the next place examin whether the matters acted in this Caſe by the Houſe of Commons be Warranted by theſe Powers, of the Parliament, and have been done in purſuance of thoſe Powers.

And upon Examination, we ſhall find they have done nothing but what they had a full power to do, and what is agreeable to the Law and Uſage of Parliament.

It is ſet forth in the Plea, (and admitted by the *Demurrer*, but we all know it to be true) that there was an Horrid Devilliſh, &c, Popiſh Plot. The Enquiry after which, and the ſearching of it to the bottom. and diſcovering all the Accomplices, was *Negotium Arduum*, and it did, *Regem & Statum Regni ſpecialiter tangere*, according to the Writ of Summons to Parliament.

For the Plea tells us the deſign of it, *viz. to Kill the King*. 2*ly*. To ſubvert the Government and the Laws, to ſuppreſs the True Religion, and to deſtroy the Profeſſors of it.

The Plea ſhows, that One great Lord was convicted of it by Impeachment of the Commons, and attainted before the Lords. The Kings Speech ſhows there was need of further Enquiry, and that it was not as yet thoroughly done, nor himſelf, nor the two Houſes ſafe; and the King charges both Houſes to make an *Impartial* Enquiry. The word *Impartial* imports, there might be ſome great Perſons concern'd, that might be apt to be favour'd.

And the Plea ſhows that both Houſes accordingly made a ſtrict and impartial Enquiry after the Conſpiracy.

All this appears plainly to be the proper Work of a Parliament, and his Majeſty himſelf was of that Judgment, and charged them to do their Duty in it.

And the Enquiry is the moſt proper Buſineſs of the Houſe of Commons.

The Houſe of Commons the Grand Inqueſt of the Nation.

For this Reaſon they are commonly ſtyl'd *The Grand Inqueſt of the Nation.* tho' Sir *Rob. Filmer*'s bold writing terms them ſo by way of Diminution and Contempt, (as if enquiry were their higheſt work).

This Inquiry of theirs is neceſſary in a Subſerviency to all the ſeveral High Powers of that High Court. Namely, in order to their Legiſlature, or to the Exerciſe of their Power of Judicature.

Courts that have Power of *Oyer and Terminer*, and to puniſh Great and Enormous Crimes, are ſtill by their Commiſſioners arm'd with a Power of Empannelling grand Inqueſts, to make Enquiries in order to their Exerciſe of their Power of determining.

Or it may be in order to their Counſelling Power, for removal of great Officers or Favourites, whereof I have given an Inſtance,

ſtance, and the Parliament Rolls and Journals are full of them.

But ſtill they firſt make Enquiry. They enquire among themſelves, and every Grand Jury Man by his Oath, is to impart his Knowledge in any thing Material to his Fellows. But the moſt effectual Enquiry is moſt probably from without doors; and without ſuch enquiry, things of great importance may lye conceal'd.

And the Defendants Plea ſhows ſome good effect of that Enquiry. Diverſe were convicted: And one *Tho. Dangerf.* deliver'd in an Information, and that upon Oath, and firſt to the Lords Houſe, ſo that it did not begin with the Commons; but if it were ſo Infamous and Malicious, why did not the Lords Reject it, and Commit the *Informer* and puniſh him? No, they receiv'd it, and Entred it of Record in their Journal. The Reaſon was, it was done in a Courſe of Legal proceeding, they could not reject it, being the proper Court of Juſtice for a thing of this Nature. And the King had given it them in charge to enquire. Nor do they by receiving of it give it any Countenance or Credit. Then why ſhould it be ſo heinous a thing in the Houſe of Commons, more than in the Lords? Let us remember ſtill they are but one Body; and though they ſever themſelves for their better diſpatch of their great Affairs, and diſtribute the Work amongſt them, yet the Power by which they Act, is Entire.

But why ſhould any man divide and ſever thoſe that are Entire? It concerns the Lords equally with the Commons.

But how comes it to concern the Speaker of the Commons ſo highly above the Houſe it ſelf, who Acts meerly as a Miniſter, and by Command of the Houſe; but that, I reſerve for a point diſtinct.

But perhaps it may be allow'd, that what is done by either Houſe, in receiving *Dangerfield*'s Information and entring of it in their Journals is Parliamentary enough. But the Offence and Scandal ariſes firſt upon the publiſhing of it in print. Now a word or two to that.

The printing *Dangerfield*'s Information.

Let us conſider how publick this Information of *Dangerfield*'s was before the printing of it. It was made very publick by being deliver'd at the Bar of the Lords, the High Court of Parliament; and indeed all Courts of Juſtice ought to be open and of eaſie Reſort.

The Information of *Dangerfield* is firſt made a Record of that Court, and to a Court of Record any perſon may reſort, as Sir *E. C.* tells us in his Preface to the 3*d. Rep.* and that it was the Ancient Law of *England*, and is ſo declar'd by a General Act of Parliament, 46 *E.* 3. *C.* which tho' a general Law is not in the printed Book of Statutes, as I obſerv'd of another general and uſeful Act of Parliament before (however it comes to paſs) In that Act of 46 *E.* 3. the Commons prayed that a Record of whatſoever is done in the King's Court, ought in Reaſon to remain there for perpetual Evidence for all perſons. And they complain that of late the Court had refus'd to ſuffer the People to ſearch and

46 *E.* 3. *C.* Search of Records muſt be Free.

to have Exemplifications for evidence againſt the King or to his diſadvantage.

Therefore they pray that ſearch and Exemplification be made to any perſons of any Record whatſoever, though it concern the King or any other, and make againſt the King or any other.

And the Anſwer is, *Le Roy le voet.*

But then it was made more publick, by being deliver'd in at the Bar of the Houſe of Commons, which ought to conſiſt of about 500 Members, who are ſuppos'd to come from all parts of the Kingdom: So that this was made very publick, before this publiſhing of it in print.

Let me obſerve by the way, that this Author of the Information (*Tho. Dangerfield*) was not ſent for by the Houſe of Commons, but for any thing that appears, applies himſelf to the Houſe of Commons, as he had before done to the Lords, of his own accord, ſo that this is far from malice or ill deſign.

The Commons order it to be entred in their Journal, among other Informations that had been given them.

And beſides, they order this and ſeveral others to be Printed.

The Offence and Scandal is ſuppos'd by Mr. *Att.* Information to begin here: what need was there of printing it?

I wiſh we could hear the Houſe of Commons anſwering for themſelves to this point: they could (it may be) give a better account of it, and a ſufficient reaſon for the Printing of it.

But let it be obſerv'd, they barely cauſe it to be Printed.

They do not give any Atteſtation or Credit to it, but leave all that hear or read it, to judge or believe as they think fit. They do not make it their own, by printing it without mention of the true Author, they ſtyle it the Information of *Tho. Dangerfield*, as indeed it was; they do not adopt it their own, as they had done, had they left out the name of the Author.

Nay the Author himſelf had deliver'd it in a courſe of Juſtice and in the Higheſt Court of Juſtice, *i. e.* before the Lords in Parliament. If it were a Libell and Slander, why did the Lords receive it, and cauſe it to be entred of Record as they did? Why did they not rather reject the Information and puniſh the Author?

See the 1*ſt. St.* in ſuch Caſes of Reporting falſe News, *viz.* *W.* 1. *c.* 34. the Reporter is only to be impriſon'd till he have found out him of whom the word was moved. So is 2 *R.* 2. *C.* 5. the Stat. *de Scandalis Magnatum.* So is 12 *R.* 2. *c.* 11. *Dier* 155.

If it were no Crime in the Author to deliver it to the Lords, were it true or falſe, Why ſhould it be a Crime to Print it as being his, and with his Name?

Whether the matter of that Information were true or falſe, yet what is done by the Houſe of Commons and by the Defendant as their Speaker, is all true, that is that *Tho. Dangerfield* had drawn up, and was the Author of ſuch an Information, and this was true. By the Statutes that puniſh the Reporters of falſe News, the penalty is but Impriſonment, till the firſt Author be brought forth, and that is done in this Caſe.

The

The Author is avouch'd, and his name is Printed with the Information, and it is upon Record in the Lords Houſe, and he in perſon did preſent it to the Lords.

Beſides, if there can be any juſt reaſon or occaſion aſſign'd for the Printing of it, it ſhall never be aſcrib'd to malice or ill deſign, and without malice alledg'd, this Information lies not.

Nor can a thing ſo diſhonourable as malice and ill deſign, be decently or juſtly conceiv'd or objected againſt ſo Great and Grave an Aſſembly: why? it is the Body of the whole Nation.

And can a whole Nation be in Reaſon ſuſpected to harbour Malice, and to have a Deſign againſt the Commmon-weal, that is againſt themſelves?

There may moſt probably and juſtly be this in the Caſe, to induce the Printing this Narrative or Information of *Dangerfield*.

The Plot was very deſperate and dangerous, it was not yet fully diſcover'd and ſearch'd to the bottom.

They were Commanded by the King to ſearch further into it. Beſides it was the proper work of the Houſe of Commons ſo to enquire, as they were the Grand Inqueſt of the Nation.

Here was one poſitive Witneſs already that had ſworn to theſe particulars, before the Higheſt Court of Juſtice, where the great Perſons concern'd in it, ſate themſelves as Members of the Lords Houſe.

But one Witneſs alone, though it were ſufficient to make an Accuſation, yet it was not enough to make a Conviction; in High Treaſon the Law requires two at leaſt.

The Houſe of Commons could not in Duty and Conſcience to the King and Kingdom, paſs it by or let it ſleep.

This Information tho' but from one man, might poſſibly have given Courage to another Perſon or more than one to teſtify to the ſame particulars, if there were any more that knew them to be true, who were unwilling to be the firſt in the diſcovery, not knowing but they might ſtand ſingly in it: but finding the diſcovery already made and ſworn to, might then think it their Duty, and be encouraged to appear alſo in it, when it might probably be of effect and amount to a Legal Teſtimony. The difficulty, and the danger, and diſcouragement, lay upon the firſt Informer.

This Conſideration might induce the Houſe of Commons out of a Senſe of their Duty, to make a further and impartial enquiry as his Majeſty had commanded them, to make it yet (if poſſible) a little more publick in order to a fuller proof: and Printing is but one way among many other of Publiſhing or Enquiring into any matter.

The Lady *Mayrifons* Caſe *Crok. Jac.* 162. but more fully in *Marſhes* Actions of Slander *fol.* 19. 20 If an action of Slander be brought for Reporting what another had ſaid Slanderouſly, the *Pl.* in his Declaration muſt aver that *A.* did never ſo report: the Defendant may Plead that in truth *A.* did ſo report, and it is a good Plea, by *Tanfield. Leonards Rep.* 1. *P.* 287. in an Indictment upon the *Stat.* of *W.* 1. *c.* 33. and 2 *R.* 2. *c.* 5. for reporting falſe News, it was found *bills vera* as to the Defendant's reporting the falſe News, but as to the *malicioſe & ſeditioſe, Ignoramus*, and the Defendant therefore diſcharg'd.

And

And of late years enquiry by Printing has been a moſt frequent practice, and we meet with it every week, and it is become the moſt ordinary way of making enquiries, which run into all parts of the Nation. And the Printing of publick Proceedings at Tryals, has been generally of late practis'd by the Courts of Law, or by the Judges of thoſe Courts, or by the chief of them.

But what has made this Information of *Dangerfield's* more publick, than Mr. Attorney General's preferring this Information againſt the Defendant Mr. *Williams*, for cauſing it to be publiſh'd in Print?

Had it not been thus awaken'd again, it might have ſlept in ſilence, and have been Buried in Oblivion.

Tacitus the *Roman* Hiſtorian tells us in his Annals in the Life of *Nero*, of one *Fabricius Veiento*, who was accus'd for uttering ſlanderous Speeches againſt the Lords of the Senate and againſt the Prieſts, in certain Books, which he termed *Codicelli's*, which in our Dialect, is the ſame with Libels or little Books.

Nero would have the hearing of the Cauſe himſelf, and he was Convicted before him, and was Condemn'd to Exile, and his Books were Sentenced to be burnt.

Tacitus obſerves, that before this Sentence for the burning of the Books, there was little notice taken of theſe Books, and few there were that read them: but when once it grew dangerous to read them, then they were much ſought after.

But the very opening of that Information of *Dangerfield* here in this great Court, and in ſo great an Audience, which was of neceſſity, and occaſion'd by Mr. Attornies Information that recites it, tho' Mr. Attorney never intended this ill conſequence, hath made the matter of it as publick as poſſibly can be.

And it muſt be obſerv'd, that it never yet came ſo far as to a Tryal, nor to have an Ignoramus found, much leſs to an acquital *modo legitimo*, in which caſe, according to the Opinion of ſome Judges, an Action of Conſpiracy, or upon the Caſe for a Slander will not lye, as not being ripe for it till an Acquital: by the ſame Reaſon it is not ready for an Information, which is but the King's Suit, the Reaſon being the ſame in both.

But

But it may perhaps be thought, that in reſpect of the Perſons concern'd in it, this was too high a Flight, and too bold an Attempt, and that the height and eminence of ſome perſons may exempt them from common Juſtice, and from the Power even of a Parliament. The Perſons too great to be ſo uſed.

In anſwer to which, I would obſerve, that ſome Laws are more eſpecially levell'd againſt the Higheſt Subjects.

By the Statute of *W.* 1. *c.* 5. The King forbids that *nul haute homme*, no High or Great Man, upon pain of grievous forfeiture, diſturb Elections, but Elections ought to be free.

The like may be obſerv'd in the Statute of *W.* 1. *c.* 35. *Des hautes hommes*, &c.

And the greater the Perſons are, if they are in the rank of Subjects, they muſt be ſubject to the King's Laws, and they are the more proper for the undertaking and encounter of this High Court. It will not be *Impar congreſſus.*

I cited before, *the Mirror of Juſtices, Chap.* 1. *Pag.* 9. where it is ſaid, that Parliaments were ordained for to hear and determine in ſuch wrongs, and againſt ſuch Perſons, *eſpecially againſt whom otherwiſe Common Right cannot be had.*

I will cite no Hiſtorians to prove what hath been done in Antient Times within this very Kingdom, of this Nature againſt the higheſt Subjects.

I will keep ſtill within my own Sphere, and cite none but Authorities in Law. And ſo keep my ſelf in the way that belongs to me, and ſo doing, I am under the Protection of this Court and of the Law, and may relye upon the performance of that Bleſſed Promiſe, *He will keep thee in all thy ways.*

There muſt be no reſpect of Perſons in doing Juſtice. The great Judge of all the World gives it as a Rule, and himſelf gives the Example, *God is no reſpecter of Perſons.*

The King was pleas'd to charge both Houſes, to make a ſtrict and *impartial* Enquiry.

I ſhall cite two Authorities in Law, that come to this point.

John, Earl of *Moreton.*

The firſt is in Caſe of *a Brother and an Heir apparent* too, and of a Perſon that did after ſucceed in the Crown. King *Richard* the *1ſt.* in his *Magna Curia, petiit ſibi Judicium fieri de Comite Johanne fratre ſuo qui contra fidelitatem quam ei juraverat, Fœdus contra eum cum inimico ſuo Rege Franciæ inierat.* That was the Offence charg'd.

It may poſſibly be Objected that the King himſelf complain'd: True, but he complains to the proper Judicature: This proves their Power.

Hunts Arguments for Biſhops, *fol.* 80.

But what did the High Court do upon that Complaint?

They pronounc'd a very ſevere Sentence, tho' it were but in the Nature of a mean proceſs to make him appear, and Anſwer.

Seld. Tit. of Hon. fol. 707. The Lords Order or adjudge, that if *John* Earl of *Moreton* did not appear within 40 Days after Summons, *Judicaverunt Comitem Johannem demeruiſſe Regnum.*

Let me remember you of a ſtronger and higher Caſe, and I have it out of an Author of the Law too. *Crompt. Juriſd. of Courts* in his *Chapter of the Court of the King's Bench.*

In a Caſe of *Corpus cum Cauſa. Whidden*, one of the Judges of the Court, cited a Caſe that did happen in the time of *Gaſcoign Ch. J.* in the Reign of King *H.* 4. *Gaſcoign* committed the Prince of *Wales* (who was afterwards our King *H.* the *5th.*) to Priſon for endeavouring to take away a Priſoner from the Bar of the King's Bench, and the Prince humbly ſubmitted and went to Priſon, and the King hearing of it, commended it.

If the King's Bench, being an Inferior Court to that high Court, might ſoar ſo high, how much more the higheſt Court of the Realm; where the King ſits in the Exaltation of his Orb, and is in his greateſt Splendor?

The King indeed is preſum'd in Law to be in this Court, which makes the ſtyle of its proceedings to be *Coram Rege*, and ſome of our Kings have been ſaid to have ſate here. But the King is in his High Court of Parliament, *per Eminentiam*, as *K. H.* 8. one of the higheſt and moſt reſolute of our Kings, ſaid in the Caſe of *Ferrers* (which I cited before to another Point.) That he was informed by his Judges, (who were all then preſent)

ſent) that he in no time ſtood ſo high in his State Royal, as in the time of Parliament. Then if we conſider the Perſon whom the *Ch. J. Gaſcoign* Committed. He was a continuing, ſettled, fixed Heir, and then Prince of *Wales*, whoſe Chair now ſtands Vacant in the Lord's Houſe in time of Parliament, and afterwards this Prince of *Wales* proved a Renowned King.

Neſcit Imperare qui neſcit obtemperare. The Sacred Scriptures tell us, that the *Heir differeth nothing from a Servant.* I may ſay alſo from a Subject, *until the time appointed of the Father*, Gal. 4. 1, 3.

What would the Author of the Sermon preach'd before the Univerſity have ſaid in theſe Caſes that I have cited?

He would have call'd them Unwarrantable Proceedings, and would have affirm'd that the Perſons thus proceeded againſt, were too ſacred to be touch'd with ſuch unhallowed Hands. This hath been the Bold Language from the Pulpit and the Preſs, if the Title of the Book be true from a *Cambr. Dr. Oblitus Profeſſionis ſuæ, quæ nil niſi lene ſuadet & juſtum.*

And the Author while he was guilty of groſs Flattery on the one hand, was not afraid to run into the other Extream, of ſpeaking Evil of Dignities, on the other hand, of one of the three Eſtates of the Realm, of the Repreſentative of the Great Body (whereof he himſelf makes but a ſmall inconſiderable Atome).

So called 1 *Eliz.* c. 3. 4 *H.* 8. c. 8. the Houſe of Commons call'd the *Honourable Houſe* in the Petit. of *Rich. Strode*, which is part of the Act.

We know from certain and undoubted Hiſtories of our own, that in the time of King *H.* 8. greater Perſons in the Account of the Law than the Prince of *Wales*, and yet but Subjects of the King have been brought to Tryal, and that before Lords Commiſſioners; and however, in other Reſpects their Caſes might be very hard, yet it was never doubted but they were Subject to the Law and Juſtice.

Now to proceed to my ſecond Point, wherein I ſhall be brief. *viz.*

2d. Point.

That however, the Matters Charged in the Attorney General's Information are not to be imputed to the Defendant in this Caſe: He being but the Miniſter or Mouth of the Houſe, and Acting only by their Order.

He

He is frequently in the Parliament Records ſtyled the *Mouth* of the Houſe whoſe Speaker he is.

Mr. *Fryn E Contra* in his Preface to Sir *Rob. Cot. Abr.* but nothing clear.

Mr. *Hakewell* in his Treatiſe of Parliaments *fol.* 200. among the Catalogue of Speakers, begins with *Petrus de Mountf.* whom he makes Speaker 44 *H.* 3. of the Houſe of Commons, and he cites the Regiſter of St. *Albans* for it, *Fol.* 207. where it is ſaid that *Petrus de Mountford Vice totius Communitatis* conſented to the Judgment of Baniſhment of *Adomar de Valence* Biſhop of *Wincheſter*, and Sir Robert *Cotton* agrees with Mr. *Hakewell* in this Point. Mr. *Fryn* in his Preface to Sir *Robert Cotton's Abr.* is of an Opinion by himſelf, that *tota Communitas* ſignifies the whole Baronage. But it apppears by the Body of the Letter there written, that *Communitas* is diſtinguiſhed from the *Majores.* Sir *Sir Robert Cotton's Abridgement 6 E.* 3. *fol.* 12. in the upper part, It is ſaid, the Lords and Great Men *by the Mouth* of Sir *Henry Beaumont.*

Mr. *Hakewell* in his aforeſaid Treatiſe, ſpeaking of *William Truſſel*, ſays, the Commons aſwered by his Mouth. 13 *E.* 3.

2 *R.* 2. *Numb.* 16. Sir *Robert Cotton's Abr. fol.* 174. The Commons return their Anſwer to the King by Sir *James Pickering* their Speaker.

17 *R.* 2. *Numb.* 17. Sir *R. Cott. Abr.* 353. The King adviſing with the Commons, concerning a Peace with *France*, return their Anſwer by Sir *John Buſſey* their Speaker.

Mr. *Hakewell* in his Book before cited, *fol.* 205. 7 *H.* 4. ſays, that Sir *John Tiptoft*, while he was Speaker, ſigned and ſealed the Deed of Entailing the Crown with theſe words, *Nomine totius Communitatis.*

Mr. *Elſing* in his Treatiſe of Parliaments, *fol.* 125. tells us, that what was ſpoken by the Speaker is entred in the *Rolls*, as ſpoken by the Commons.

But take what is done by the Defendant to be his proper acting, yet he acting only as a Miniſter and Servant to the High Court of Parliament, by the ordinary Rules of Law, in Caſes of Officers, he is not ſuable, nor any way puniſhable for it.

This

This is Reſolved in the *Counteſs of Rutland's Caſe* 6 Rep. 54. and the ſame Caſe likewiſe Reported in *Moor's* Rep. 765. That an Officer or Miniſter executing Proceſs which is erroneouſly awarded (as where a *Capias* is awarded againſt a Peer) the Officer is to be excus'd; for he muſt not diſpute the Authority of the Court, but obey. And in that Caſe the Secondaries of the *Counter*, and the Serjeants in *London* were excus'd and held not guilty of any offence.

So in the Caſe of the *Marſhelſea*, 10 Rep. 76. Where the diſtinction is, If the Court have a Juriſdiction, the Officer is excus'd though the Proceſs be Erroneous. *Qui juſſu Judicis aliquod fecerit, non videtur dolo malo feciſſe quia parere neceſſe eſt.*

Keilwey 99. *a Med.* by *Brudnel*, and the Lord *Dier* in *Trewinnard's* Caſe *fo.* 60. b Where a Writ of Priviledge in caſe of a Parliament-man Arreſted, is granted, where it ought not to be; and the Sheriff by virtue of that Writ diſcharged the perſon Arreſted. Yet the Sheriff (ſaith that Caſe) is not chargeable in an Action for this: *Parere neceſſe eſt.* What that neceſſity is we may ſee in that Caſe of *Trewinnard, Dier fo.* 61. *a Med.* if the Sheriff refuſe to execute the Writ.

And as a fair warning to Sheriffs, and other Officers not to reſiſt or diſobey the Commands and Orders of the Houſe of Commons, the Lord *Dier* mentions what puniſhment was inflicted upon the Sheriffs of *London*, in the Caſe of *Geo. Ferrers.*

They were committed to the *Tower* for their contempt in not letting a Parliament-man taken in Execution, to go at large, when the Serjeant at Arms of the Houſe of Commons came for him without a Writ.

Nay the Lord *Dier* ſays, in the latter end of that Caſe of *Trewinnard*, that if the Parliament err'd (he ſpeaks it of the Houſe of Commons) yet there is no default in the Sheriff.

When the late King being in Perſon in the Houſe of Commons, and ſitting in the Speaker's Chair, ask'd the then Speaker, Whether certain Members, whom the King named, were then in the Houſe. The Speaker anſwer'd readily, and wiſely, and with a good preſentneſs of mind (which aroſe from the Genius of that Houſe) *That he had neither Eyes to ſee, nor Tongue to ſpeak*, but as the Houſe was pleaſed to direct him.

III. *POINT.* As to the laſt Point; That for matters done in or by the Parliament (as the matters in our Caſe are) neither the *King's-Bench*, nor any other Court, but the Court of Parliament it ſelf, can by Law take Cognizance of it. *This is the great Point of the Caſe.*

I ſhall firſt offer to prove it by Reaſons, and then I ſhall back and enforce thoſe Reaſons by many Authorities, and thoſe of the higheſt ſort.

1. *Reaſon.* The Parliament *gives Law to this Court* of the *Kings-Beneh*, and to all other Courts of the Kingdom; and therefore it is abſurd and prepoſterous that it ſhould receive Law from it, and be ſubject to it. The greater is not judged of the leſs.

2. The Parliament is the immediate Court for Examining the Judgments of the Court of *King's-Bench*, and if they be erroneous, they reverſe them; and if this Court ſhould againſt Law take upon them to proceed in this Cauſe, and give Judgment, the Parliament, when it Meets, no doubt, will ſet it aſide as Erroneous: And no Man does in the leaſt doubt but they have power to do it, and there is as little doubt but they will do it; therefore it is wholly in vain for this Court to take Cognizance of it; and it cannot be revers'd elſewhere, it being in a matter of Juriſdiction. See the Statute of 27 *Eliz.* c. 8. The Preamble reciting, that Erroneous Judgments given in the *King's-Bench* are only to be reform'd by the *High Court of Parliament*; which Court of Parliament was not in thoſe days ſo often holden, as in Ancient time it had been: Neither yet in reſpect of the greater Affairs of the Realm could they well be conſider'd of and determin'd in Parliament, *&c.*

1 Jac. c. 1. *The like words.*

There is an Exception of Errors that concern'd the Juriſdiction of the *King's-Bench*; thoſe remain as before; and in the Errors that are referr'd to the Judges of the Common-Pleas and Barons of the *Exchequer*, by 27 *Eliz.* c. 8. the Juriſdiction of the Parliament is to Examine them, *&c.*

3. This Court, as all the Courts of Common-Law, Judge only by the ordinary Rules of the Common-Law. But, the proceedings of Parliament are by quite another Rule. The matters in Parliament are to be diſcuſs'd and determin'd by the Cuſtom and Uſage of Parliament, and the Courſe of Parliament; and neither by the Civil, nor the Common-Law, uſed in other Courts.

4. The Judges of this, and of the other Courts of Common-Law in *Weſtminſter*, are but Aſſiſtants and Attendants to the High Court of Parliament: And ſhall the Aſſiſtants judge of their Superiors?

5. The High Court of Parliament is the dernier reſort, and this is generally affirm'd and held; but it is not the laſt, if what they do may yet again be examin'd and controll'd.

6. The Parliament is of an abſolute and unlimited power in things Temporal within this Nation.

I ſhall now proceed to Authorities that are full to this Point, and do ſecond and back thoſe Reaſons that I have offer'd; wherein I ſhall not obſerve any method by reducing or ranking of them under theſe Reaſons that I have offer'd, becauſe ſome of the Authorities juſtifie ſeveral of theſe Reaſons, all at once.

That the Parliament hath the higheſt and moſt ſacred Authority of any Court; that it hath an abſolute power; that it is the higheſt Court in the Realm, is acknowledged by our moſt Learned and graveſt Writers, and Hiſtorians; for I would not wholly omit them, though I do not need them; but I relie only, and put all the ſtreſs of my proofs and arguments upon my Authorities in Law.

Cambden in his *Britannia*, Summam *& ſacroſanctam* Authoritatem *habet Parliamentum.* Knighton, *de eventibus* Angliæ l. 1. fo. 2681. col. 1, 2. He calls it the *Higheſt Court of the* Realm. So it is call'd in *Trewinnard's* Caſe in *Dier* 60, 61. Sr. *Thomas Smith* in his Com-

Common-Wealth of *England* l. 2. c. 2. fo. 50, 51. *In Comitiis Parliamentariis posita est* omnis absolutæ potestatis vis.

Sir *R. Cotton* in his *Posthuma edit.* at *Lond.* pag. 345. cited by Mr. *Pryn* in his Preface to Sir *Robert Cotton*'s Abr. The Parliament *controlls all Inferior Courts*, and all Causes of difficulty; *cum aliqua dubitatio emergit*, referr it to the Parliament.

To shew their power and jurisdiction upon Erroneous proceedings in other Courts, by authorities in Law, which confirms one of my Reasons.

In *Trewinnard*'s case, it is said, that though the Parliament erre, it is not reversible in any other Court: This is spoken in a case where the then occasion was upon a Judgment given, only by the House of Commons, in a case of Priviledge.

Agreeable to this is 21 *E.* 3. fo. 46. *Br.* Abr. tit. Error. plac. 65. in the latter end of that case, and 7 *H.* 6. *Br.* Abr. tit. Error. plac. 68. by *Cottesmore*, and 1 *H.* 7. fo. 19. *Br.* Error. plac. 137. Error in Parliament shall be revers'd in Parliament, *& non aliter*; for *there is not an higher Court.* 1 *H.* 7. fo. 19, 20. By all the Judges in the *Exchequer*-Chamber for a Judgment in the *King's-Bench*, Error must be sued in Parliament; and as the Parliament shall correct the Judgments, so they are to correct the *Judges* that give corrupt and dishoneſt Judgments. These are the words and the opinions of the Lord chief Justice *Vaughan* in his Reports *fo.* 139. in *Bushel*'s case. Such, says he, in all ages have been complained of to the *King in the Star-Chamber*, (which is a Court now dissolv'd by Parliament) *or to the Parliament.* He there mentions many Judges; those 44. that were hang'd in King *Alfred*'s time before the Conquest, for corrupt judgments; and those in the time of *E.* 1, *E.* 3. and *R.* 2. for their pernicious resolutions: He vouches the Journals of Parliament, and instances in the *Judgment of Ship-money* in the last King's time, and the particular Judges impeach'd.

Sir *E. C.* in his 12 *Rep.* fol. 64. the words are spoken by Sir *E. C.* but (as that Rep. says) with the clear consent of all the Judges. *The King hath his Court, that is to say, in the Upper House of Parliament, in which he with his Lords is the Supreme Judge over all other Judges. For if Error be in the* Common-Pleas *that may be revers'd in the* King's-Bench; *and if the Court of* King's-Bench *erre, that may be revers'd in the Upper House of Parliament, by the King with the assent of the Lords.*

Now though this is spoken of the Lords House only, yet it must be again remembred that the Parliament (as I prov'd before) is one entire Body, and that their power in the right of it is entire, though as to the exercise of it, it is distributed into parts, and is divided: Nor can the House of Lords exercise any power as an House of Parliament, or as a Court for Errors, without the House of Commons be in being at the same time. Both Houses must be Prorogu'd together, and Dissolv'd together; like the Twins of *Hippocrates*, they live and die together, and the one cannot be in being, without the other also, at the same time be, in being too.

2. *Inſt.* 408. Matters of difficulty were heretofore uſually Adjourn'd to Parliament; but (*ſays he*) 'tis now diſuſed.

And 2. *Inſt.* 599. Courts at variance, properly complain to the Parliament.

Fol. 72. Med. 4. *Inſt.* In the *Chapter* of the Court of the *Kings-Bench*, Errors in the *Kings-Bench*, in matters that concern their Juriſdiction, and other Caſes there excepted in the Act of 27 *Eliz. Cap.* 8. cannot be Revers'd but in the High Court of Parliament.

4. *Inſt.* Fol. 67. There is a Court Erected by the Statute of 14 *E.* 3. *Cap.* 5. *Stat.* 2. *For redreſs of delays of Judgments in the Kings great Courts*, conſiſting of a *Prelate*, Two *Earls*, and Two *Barons*, to be choſen in Parliament by that *Statute*. If the Caſe before them be ſo difficult, that it may not well be determin'd without aſſent of the Parliament, (it does not ſay by the Houſe of Lords only) then ſhall the tenor of the Record be brought by the ſaid Prelate, Earls and Barons, into the next Parliament, and there a final Judgment ſhall be given.

Si obſcurum & difficile ſit Judicium, ponantur judicia in reſpectu uſq; magnam curiam. Rot. Parl. 14 E. 3. Num. ult. Sir *Jeffery Stanton*'s Caſe.

25 *E.* 3. *Cap.* 2. The Chapter of Treaſon in the 2. *Inſt. Fol.* 21. The Judge or Court in ſome Caſes, is to forbear going to Judgment till the Cauſe be ſhewed before the King and his Parliament, whether it ought to be judged Treaſon or not.

That this Court proceeds by the ordinary Rules of the Common Law; but that High Court of Parliament proceeds not by that Law, but by a Law peculiar to that High Court, which is called *Lex & Conſuetudo Parliamenti*, and conſiſts in the Cuſtoms, Uſages, and Courſe of Parliament; and therefore, this Court, nor no other inferior Court, can, for this very Reaſon, judge or determine of what is done in Parliament, or by the Parliament.

If this Court ſhould take upon it to proceed in ſuch caſes, it would juſtly be ſaid of it as a thing very irregular. *Metiri ſe quemq; ſuo modulo, ac pede, verum eſt.*

Sir Rob. Cott. Abr. 20. R. 2. nu. 14, 15.

Sir *Tho. Haxey* delivered a Bill to the Commons in Parliament, for the honour and profit of the King, and of all the Realm, complaining of the outragious Expences of the Kings Houſe, and namely of Biſhops and Ladies.

Here the *Camb. Dr.* I have before mention'd, would take occaſion again to complain of the ſaucineſs of this Bill.

K. R. 2. was offended with the Commons for preferring this Bill to the King; for it ſeems they had entertain'd this Information from a particular hand, (as was done in our Caſe from *Dangerfield*) and they proceeded upon it.

K. R. 2. ſaid it was an offence againſt his Dignity and Liberty, and ſaid he would be free therein.

And Sir *John Buſſey*, the Speaker to the Parliament (as that Roll of Parliament calls him) is charg'd to declare the Name of him who Exhibited that Bill.

By

By this, it appears the King could not take notice of what was done in the Commons-Houſe, or deliver'd to them, but by the Houſe it ſelf, and that is one of the Laws and Cuſtoms of Parliament; and yet, no doubt but it was well known to every Member of that Houſe, and yet it came not to the Kings knowledge.

Nu. 16. The Commons deliver'd to the King the Name of the Exhibiter, which was Sir *Tho. Haxey*.

Nu. 17. The Commons afterwards came, and ſubmitted themſelves to the King, and crav'd Pardon, and the King excus'd them.

Nu. 23. Sir *Tho. Haxey* was adjudg'd by Parliament to die as a Traitor. The King was offended, the Commons forſook the Exhibiter, and ſubmitted, and the Lords adjudge him guilty of Treaſon. This ſeems to be a ſtrong Caſe againſt the Liberty and the Privilege of the Houſe of Commons, (but it ſeems ſtrange how it ſhould be made Treaſon;) but it is ſtranger; eſpecially, if it be ſuppos'd this Sir *Tho. Haxey* was a Member of the Houſe, one would have thought he ſhould have been under a protection and ſpecial privilege. But I take him to be no Member, for he is afterwards call'd Sir *Tho. Haxey*, Clerk; and Graduates in the Univerſity, and thoſe in Orders, were uſually dignified with the addition of Sir; and it is not yet quite out of uſe in the Univerſity.

I find by Mr. *Pryn*, in his Plea for the Lords, *Fol.* 345. that in the next Kings Reign, *H.* 4. the Commons exhibited a Petition on the behalf of Sir *Tho. Haxey*, (for he was not Executed, the Archbiſhop of *Canterbury* took him into his Protection, being a Clergy-man;) and the Commons in their Petition affirm, that the Judgment againſt Sir *Tho. Haxey*, for delivering in this Bill to the Commons in Parliament, was againſt *Right*, and the *Courſe* that had been *uſed* before in *Parliament*, in deſtruction of the *Cuſtoms* of the Commons.

Here note, That the *Right* and *Courſe* of *Parliament*, and the *Cuſtoms* of the *Commons*, are mention'd as *Synonymies*. *Mr. Pryn. ibid.* 388.

Upon this Petition of the Commons, the Judgment is adjudg'd to be null and void.

But this could be adjudg'd no where but in Parliament, for it concern'd the Right and Privilege, and the Cuſtoms and Courſe of the Parliament.

1 *H.* 4. *Nu.* 91. In Sir *Rob. Cott. Abr.* the Record ſays, Sir *Tho. Haxey*, Clerk, Pardon'd, and the Judgment revers'd, and he reſtor'd to all.

This Caſe, in very many Circumſtances, ſuits with the Caſe of *Dangerfield*, and in many, with our preſent Caſe. Ours is in the Caſe of an Heir apparent or preſumptive. But a greater than the Heir is here, in this Caſe of Sir *Tho. Haxey*, namely, the then King himſelf.

But I cite it, principally to prove one of my Reaſons and Arguments to the third point, namely, that there are Rights and Cuſtoms that are peculiar to the High Court of Parliament; and

that there is a Law called the *Courſe* of Parliaments, and it may be obſerv'd, that the Cuſtoms of the Commons are the Law and Courſe of Parliament.

Concurring with one obſervation that I made out of this Caſe, that one of the Laws or Cuſtoms of Parliament, is, That no Member is to publiſh at the Court, or elſewhere abroad, what is done in the Houſe of Commons, but it ought to proceed from the Houſe it ſelf, and no other, (which is another Argument, to prove that no other inferior Court can enquire into, or hear or determine of their doings) for no notice can be taken of what they do, unleſs it come by their own Relation and Diſcovery.

That, I ſay, which concurrs with this, is another Roll of Parliament of that noble King *H.* 4. *viz.* 2 *H.* 4. Nu. 11. The Commons require, that is, requeſt the King, that he would not give an ear to any untrue reports of the Commons-Houſe, until the time might try the ſame; and that time is when the Commons apply to the King in it, and not before. *Whereunto the King granted*; which allows it to be the Law and Courſe of the Parliament.

4. *Inſt. Fol.* 15. Every Court of Juſtice (ſays Sir *E. C.*) hath Rules and Cuſtoms for its direction. So the High Court of Parliament, *de ſuis propriis legibus & conſuetudinibus conſiſtit.*

Again, Sir *E. C.* in his ſelect Caſes, Printed 1677. *Fol.* 63. Note (ſays he) the Privilege, Order, or Cuſtom of Parliament, either of the Upper Houſe, or of the Houſe of Commons, belongs to the determination only of the Court of Parliament.

And there he cites two Precedents for it.

The Firſt that of 27 *H.* 6. in the Controverſy between the Earls of *Arundel* and *Devoniſhire*, for Precedency: The King, by advice of the Lords, referr'd it to the Judges to examine and to report; not finally to determine as Judges of the Caſe, but as Aſſiſtants to the Lords.

☞ The Judges anſwer'd, That it *was a matter of Parliament*, and belong'd to the King and the Lords to determine.

One would think this were a ſtrange anſwer of the Judges, to deny their advice; Were they not Aſſiſtants to the Lords in matters of Law?

The true reaſon of their declining to give their Advice, is, It was a Caſe above them, and not to be determined by the ordinary Rules of Law, and therefore out of their element. *Quæ ſupra nos, nihil ad nos.* Therefore their anſwer was, That it was a matter of Parliament, and belong'd to the King and Lords, but not to the Judges.

A Reſolve of all the Judges in the point.

This is a Reſolution of all the Judges in the very point; though this particular Caſe concern'd only the Lords, being a matter of precedency between Two Lords; yet, as I have prov'd, the Parliament is one entire Body, and are mutually concerned in their powers and privileges.

Sir Rob. Cott. *Abr. pag.* 651.

The other Caſe mentioned by Sir *E. C.* is that of *Tho. Thorp*, the Speaker of the Commons, 31 *H.* 6. taken in execution at the ſuit of the Duke of *York*, during the receſs of the Parliament.

We

We have it at large in the Parliament Roll of 31 *H. 6. nu.* 25, 26, 27, 28.

The Commons, at the opening of the next Seſſion of Parliament, requeſt the King and Lords, to reſtore their Speaker to them.

The Judges being demanded of their Counſel therein; (Note, it was nothing but their Advice ask'd.) It was after mature deliberation, they anſwered, *It was not their part to judge of the Parliament, which may judge of the Law.* Note, the reaſon to judge of the Law, ſignifies they are the Supream Court to judge what is Law, and what is not. And to judge of the Law, likewiſe ſignifies, that they can judge whether a Law be good or not; in order to Approve of it, and to Enact it, or to Repeal a Law.

Mr. Pryn, *in his Plea for the Lords, calls this a famous, memorable Caſe, and ſays he was then Ch. Baron.*

This is in a Caſe that concern'd the privilege of the Commons and their Speaker; and yet they ſay, that judging in this Caſe were to judge of the Parliament: This intimates too, that the Parliament judges by other Rules than thoſe of the Common-Law. And 'tis the Common-Law is the proper Element of the Judges of the Courts of *Weſtminſter-Hall.*

This is a ſecond Reſolution of all the Judges in the very point.

A ſecond Reſolution of all the Judges in the point.

Mr. *Hakewel*, in his *Treatiſe of the manner of Enacting Laws in Parliament*, Fol. 125. reports this *Caſe of Thorp* at large.

It is time now to come to higher Authorities, that is, to Reſolutions of *Parliament* in this point.

And firſt, the Reſolution of the Houſe of Commons in maintenance of their own Right, or at leaſt a claim of their Right; I have it out of an Author that is very far from being a friend to the Houſe of Commons; and 'tis a *Clergy-man* too. I mean Dr. *Heylin*, in the Life of Archbiſhop *Laud*, Fol. 89. He reports, that *the Houſe of Commons* made a *Proteſtation* in 1621. againſt all Impeachments, *other than in the Houſe*, for any thing there ſaid or done.

A Proteſtation of the Commons againſt Impeachments, other than in the Houſe, &c.

Let me preſent you with the like claim made by the Lords, which ſeems to run ſomething in the form of an old Act of Parliament.

The like Claim of the Lords, *and confirm'd by Act.*

In Sir *Rob. Cott.* Abr. 11 *R.* 2. *nu.* 7. In that Parliament, all the Lords, as well Spiritual as Temporal; being preſent, claimed their Liberties and Franchiſes; *viz.* That all weighty matters in the ſame Parliament, which ſhould be afterwards moved, touching the Peers of the Land, ought to be determin'd, judged, and diſcuſſed *by the Courſe of the Parliament*, and not by the Civil Law; *nor yet by the common Laws of the Land, uſed in other more Courts of the Realm.*

The which Claim and Liberties the King moſt willingly allow'd and granted thereto in full Parliament ſays that Roll.

Now, as I have before prov'd, the Liberties and Franchiſes of the Parliament, in the right of them, are entire, and due to both Houſes, for both make up the Parliament.

Mr. *Seld.* in his *Title of Honour*, *Fol.* ſays, That a thing granted in full Parliament, ſignifies an Act of Parliament.

Now

An Act of Parliament in the point.

Now for an Act of Parliament full in the point, and then I can go no higher.

Pryn's *Plea for the Lords, fol.* 401 *at large.*

It was in the Case of *Richard Strode*, one of the Burgesses for *Plympton* in *Devonshire*, in the Parliament of 4 *H.* 8. for agreeing with the Commons House, in putting out Bills (as it is reported there) which seems to resemble the *Printing or Publishing*, mention'd in our Case. Those Bills so put out were against the Abuses of the Tinners, who were a great and numerous Body of men; who by these Bills took themselves to be scandalized and slandered.

After the Parliament was risen, this *Richard Strode* for *what he had so done in Parliament*, was presented and found guilty in the *Stannary-Courts*, and condemn'd to forfeit 40. *l.* (*a moderate fine.*). He was for this imprison'd in a Dungeon, within a Castle, and fed with Bread and Water.

When the Parliament met again, he Petition'd the Parliament for remedy, and that the *Judgments* had against him *and the Executions* might be *made void*; which was done accordingly *by Act of Parliament*.

4 H. 8. *c.* 8.

And it was further Enacted, That *all* Suits, *Accusations*, Condemnations, Executions, Fines, Amerciaments, Punishments, pass'd or had, or thereafter to be pass'd or had, upon the said *Strode*, and to every other person, that *was in that Parliament* (thus far it is a private and particular Act) but the reason of this, and the Justice of it extends to all like Cases; but then it goes farther, *Or that of any Parliament hereafter shall be*; for any Bill, speaking, reasoning, or declaring of any matter concerning the Parliament, to be communed or treated of (these are very large and general words) *be utterly void*, and of none effect. And it goes farther yet, And that any person vexed or, troubled, or otherwise charged for any Cause, as aforesaid; shall have an *Action of the Case*, against every person so vexing contrary to this Ordinance, and recover treble damages and costs.

Here now is an Action given against one, for what they shall do in a course of Justice. But it is because it is suing in an inferior Court that has no jurisdiction in the matter. This Act takes away all jurisdiction in such Parliament Cases, from all other Courts. I know that in the Case of *Denzill Hollis* (afterwards the Lord *Hollis*) Mr. *Seld.* and others, 3 *Car.* 1. the Judges being consulted upon some Questions propounded, *Resp.* That that Act of *Strode*'s, was a particular Act, and extended to *Strode* only; and no doubt it was a particular Act in a great part of it, and in that part extended to *Strode* only.

Memorials of the English *Affairs, fol.* 12.

But if the Judges meant that no part of that Act was a general Law, then I must crave leave to say, 1. That their opinion was extrajudicial; it was delivered upon their being consulted with about Questions propounded to them, and therefore hath not that weight. And I must take the liberty to appeal to the very words of the Statute it self, and to any man of reason, and honesty, to use his reason aright, that shall read them; and I must offer some reasons against their opinion, and cite some good Authority in that point, and then leave it to this Court to judge of it.

The

The words, and perſons, and time mention'd in the latter part of that Act, are general.

It ſpeaks indeed, firſt of *Strode* in particular; but then it hath theſe words (every other perſon.)

It mentions that Parliament in particular; but then it proceeds to ſpeak of (any Parliament that there-after ſhall be) Then the things alſo are general that the Act extends to, not onely to indemnifie *Strode*, for what he had ſaid, or done in parliament; but then the Indemnity extends to every other perſon, *for any Bill, Speaking, Reaſoning, or Declaring of any matter concerning the Parliament.*

The words of the Royal Aſſent to this Bill, are ſuch as are conſtantly uſed, only to general Acts, *viz. Le Roy veut*; whereas to a particular Act, the Royal Anſwer is, *Soit droit fait al parties.*

And this Act of 4 *H.* 8. is enrolled as general Acts uſe to be. But a private or particular Act is always fil'd, but never enroll'd; for this latter diſtinction we ſhall find it in the Caſe 33 *H.* 6. fol. 17, 18. for authority in this queſtion, Sir *E. C.* in his 4th. *Inſtit.* fol. 19. holds this Act of 4 *H.* 8. in the latter part of it to be a general Act.

It is indeed commonly ſaid *Boni Judicis eſt ampliare juriſdictionem.* But I take that to be better advice which was given by the Lord Chancellor, (Sir *Francis Bacon*,) to Mr. Juſtice *Hutton*, upon the ſwearing him one of the Judges of the Court of Common-Pleas; That he would take care to contain the juriſdiction of the Court within the ancient *Mere Stones* without removing the Mark.

I find but one Reſolution in all our Books, that I can meet with, that ſeems to make againſt us in this point, and maintains a juriſdiction in this Court, for a Miſdemeanor, or Conſpiracy ſuppos'd to be done by ſome particular Members of the Houſe of Commons, in the Houſe in time of Parliament. It is reported by Mr. Juſtice *Croke* in his Reports of the time of King *Charles*, fol. 181. but it is more fully reported in a late Book, entitled Memorials of the Engliſh Affairs, ſet out by a Learned Lawyer, and the Son of a Judge; and it is the Caſe that I lightly touch'd upon but now, that of Mr. *Hollis*, *Selden*, &c.

The offence charg'd upon Mr. *Denzill Hollis* (who was afterwards the Lord *Hollis*,) Mr. *Selden*, Sir *John Elliot*, Sir *John Hobart* and divers other Parliament-men, was for a force uſed upon the then Speaker, Sir *John Finch* (afterwards Lord Keeper) in keeping him in the Speaker's Chair againſt his will, when he would have left it; and preſſing him to put a queſtion, which the King had forbidden him to put. *See* Ruſhw. *Collect.* 1 *part pag.* 672. *Appendix to it pag.* 44.

For this ſuppoſed offence, after the Parliament was Diſſolv'd, theſe Parliament-men were firſt convened before the *Council*, where they refus'd to anſwer the Charge, it being for matters done in Parliament.

Then the Judges had Queſtions propounded to them, to which they gave their reſolutions, *that for things done*, not in a Parliamentary way, a Parliament-man may be puniſhed after the Parliament

is ended, if he be not puniſhed in Parliament; otherwiſe as J. *Croke*, ſaid, *There would be a failure of Juſtice*, but, that regularly *he cannot be compell'd out of Parliament to anſwer things done in a Parliament in a Parliamentary courſe.*

This Anſwer ſeems to be very oracular, for it reſolves that a Parliament-man ſhall not Anſwer for things done in Parliament in a Parliamentary courſe. If it be done in a Parliamentary courſe, what occaſion can there be to anſwer for it? But who ſhall judge what is a Parliamentary courſe, but a Parliament? not Judges of the Common-Law; for the Parliamentary courſe differs from the Rules of the Common-Law.

But they refuſing to anſwer at the Council-Board, were committed cloſe Priſoners to the *Tower*.

After this Sir *Robert Heath*, the King's Attorney, preferr'd an Information in the *Star-Chamber* againſt them, that was not proceeded in. The Lord Keeper was under difficulties about it, ſays, the Author. The Judges of the *King's-Bench* were to conſult with the reſt of the Judges in granting a *Habeas Corpus* for bailing the Priſoners. The reſt of the Judges would hear arguments, ſo it was put off, and delay'd, (as our Author reports it.) At laſt an Information was exhibited againſt *them in the King's-Bench*. The Defendants pleaded to the juriſdiction of the Court; their plea was over-rul'd, and they refuſing to plead over, judgment was entred by *nihil dicit*, and they fined and impriſon'd.

The Reſolution of the Commons in Trewinnard's *Caſe is called the Judgment of the moſt high Court of Parliament. If it had been clear that the* King's-Bench *could have puniſhed it, they would have begun with it there, but they try'd the* Council *and the* Star-Chamber *firſt.*

Mr. J. *Croke*, at the latter end of thoſe Reports gives this further account of that Caſe, that afterwards in the Parliament 17 *Car.* 1. It was *Reſolv'd by the Houſe of Commons*, that thoſe Parliament-men ſhould have a recompence for their damages ſuſtain'd for the ſervices to the Commonwealth in the Parliament, 3 *Car.* 1. If a Judge hath thought fit to report this, it may be as fit for me to mention it. I take that to be the firſt precedent or reſolution given in any caſe for what was done in Parliament, and it ſtands alone; I have heard of none ſince that neither. It ſeems to be directly againſt the proviſion made by it; it is clearly within the Equity and Reaſon of it, *Strode*'s Act. I wiſh I could not ſay that even thoſe times of 3 *Car.* 1. were not full of trouble. It appears much by the *difficulty the Judges ſeem'd* to be at in the proceedings of that Caſe; this detracts much from that veneration, that otherwiſe is juſtly due to a Reſolution ſo ſolemn as that of all the Judges.

The Lord Chancellor *Bacon* in his profound Book of the Advancement of Learning, diſlikes all Precedents that *taſte of the times*; and adviſes that Precedents ſhould be deriv'd from good and moderate Times.

The only reaſon that I find given for that proceeding in the caſe of *Denzill Hollis*, is that given by Mr. J. *Croke*, viz. *That otherwiſe there would be a failure of Juſtice.*

This reaſon muſt be grounded either upon the *Infrequency* of Parliaments, or upon an opinion that *Parliaments will be partial* in caſes of their own Members.

As

As to the first of these (the long intervals between Parliaments,) This under favour ought to be no reason, especially to come from a Judges's mouth, (I have a great honour for the memory of that Reverend Judge) who must needs know, and ought to assert it, That by the Law, Parliaments ought to be very frequent, and Judges ought to take part with the Law, and to maintain it.

Before the Conquest (as 'tis untruly call'd) by the Law, Parliaments were to be held twice a year, as appears by King *Edgar*'s Laws, c. 5. in *Lamb. de prisc.* &c.

And the Mirror of Justice c. 1. Sect. 3. tells us that King *Alfred* ordain'd for a perpetual Usage; that twice in the year, (and if need were) oftner. The Seniors or Earls should assemble themselves at *London*, to speak their minds.

And 'tis reckon'd among the *Abusions* (as they are there term'd) *of the Common-Law*; That whereas Parliaments ought to be twice in the year for the salvation of the Souls of Trespassers (and at *London* too) that they are there but very seldom, and at the pleasure of the King, for Subsidies and Collections of treasure.

And by the Statute of 4 *E.* 3. c. 14. Parliaments ought to be once a year, and oftner (if need be) I have heard a Civilian in the House of Commons give this construction to that short Act, that the words (If need be) should referr to the Parliaments being (once a year) aswell as to the words (and oftner) and I never heard that any man was of that opinion but himself; but I remember he himself laught when he spoke it, but he was more laught at for that ridiculous exposition. And should that sense be put upon it, it would make the Law a very ridiculous thing indeed, for then the short of it would be this; *That we should have a Parliament when there is need.*

But to refute that fancy, there is another Statute of the same King's time, namely, 36 *E.* 3. c. 10. which says, that for redress of divers mischiefs and grievances, which daily happen, its accorded that a Parliament shall be holden every year without any such restriction (If need be.)

And by the Act of 16 *Car.* 2. c. 1. These Acts are declared to be in force. And farther, it is Declared and Enacted, That the holding of Parliaments shall not be discontinued above three years at the most.

Now how can any man say in Defiance of these Laws, That there can be any long discontinuance of Parliaments? His now Majesty has been pleased graciously to declare his Resolution often to meet his People in Parliaments, and in the word of a King there is power. Nay, we have the King's Oath for it, for he is sworn to observe the Law; And *eadem præsumitur esse mens Regis quæ legis*; And it is an high presumption for any man to think, or say otherwise. *King Charles the Second.*

For that other ground of that reason given by Mr. Justice *Croke*, viz. That there would be a failure of Justice, if offences committed in Parliament, were not punishable in the *Kings-Bench*-

Bench; namely, becauſe Parliaments will be partial in Caſes of their own Members. This carries with it a very high reflection upon that great and ſolemn Aſſembly, to entertain a thought ſo mean, and ſo diſhonourable of the Supreme Court of the Nation, that the Court which is to Correct the Errors of all other Courts, and is the laſt reſort of the Nation, that they ſhould be guilty of Injuſtice and Partiality.

No Man that is a lover of his Country, or a friend to his own true and honeſt Intereſt, will harbour a diſhonourable thought of that great Aſſembly.

I am apter to think, that the reporter of that Caſe did miſtake, when he charg'd that worthy and reverend Judge, Mr. Juſt. *Croke*, with the offering of that for a Reaſon.

I find the moſt Reverend of our Judges ſpeaking with the greateſt Reverence of that Supreme Court.

Beſides, the Learned Lord Chief Juſtice Sir *Edw. Coke*, who often expreſſes his great veneration for them,

Hear what the Ch. Juſt. *Brook*, and Juſt. *Saunders*, ſay of that Aſſembly in *Plowd. Comment.* in the Caſe of *Hill* and *Grange*, *Fo.* 175. *a.* towards the lower end of that *Folio*, *Injuſtice* (ſay they) *may not be preſum'd of a Parliament.* And in the Earl of *Leiceſter*'s Caſe, in the ſame Comment, *Fol.* 398. towards the end of the Folio, *The Parliament is a Court of very high Honour and Juſtice, of which no man ought to imagine a thing diſhonourable.*

I do agree, that an offence committed in Parliament, is a very high offence; but the higher it is, the more proper it is for their Judicature; and that Court is arm'd with a power to puniſh the higheſt offences, and the higheſt offenders.

But to take it out of their hands, and to make it determinable in any other Court, is a diſparagement to that Grave and Supreme Court.

We eaſily agree that a Parliament may Erre, for they are not Infallible; but the Law hath provided a Remedy againſt thoſe Errors, and a way to Reform them. A ſubſequent Parliament may Reform the Errors of a preceding Parliament, as I have prov'd by ſeveral Authorities.

But to ſay they will be partial or unjuſt, or corrupt, or do any thing out of malice, is to raiſe a ſcandal upon the whole Nation, whoſe Repreſentative they are.

I will make no difficulty to affirm, That if any offence whatever be committed in the Parliament, by any particular Members, (as this was accounted a Force or Riot in the Caſe of *Denzill Hollis* and *Selden*, and others committed upon the Speaker) it is an high infringement of the right and privilege of Parliament, for any Perſon or Court to take the leaſt notice of it, till the Houſe it ſelf either has puniſh'd the Offender, or referr'd them to a due or proper courſe of puniſhment. To do otherwiſe, would be to make the higheſt Court an Offender, and to charge them with Injuſtice.

Nay,

Nay, their right and privilege ſo far extends, that not only what is done in the very Houſe ſitting the Parliament, but whatever is done relating to them, or in purſuance of their Order, during the Parliament, and ſitting the Parliament, is no where elſe to be puniſh'd, but by themſelves or a ſucceeding Parliament, although done out of the Houſe, as in the caſe of *Ferrers*.

If any ſhall imagine, as Mr. *Pryn* does, and others, that of later times the Parliament have encroach'd more power than anciently belong'd to them, I have already anſwer'd this objection, by ſhewing how large a power they exercis'd of old, and ſee what is further mentioned in *Lamb. Archion* 57. *viz.* That King *H.* 3. was told by his Lords Spiritual and Temporal, that of ancient time the Creating and Depoſing of all the Judges and great Officers belong'd to the Parliament.

I do not deny, but ſome ſort of Orders by them made, are no longer in force than while the Parliament ſits; but then, what is done after the Parliament is riſen, is not to be ſaid to be done by their Order, for then it ceaſes to be their Order: This muſt be underſtood of matters Executory, not as to things executed by their Order during Parliament.

However, this Caſe of *Denzill Hollis* comes not home to our preſent Caſe, but 'tis wonderfully ſhort of it: This was an Offence charg'd only upon ſome Particular Members; and it cannot be denied, but particular perſons, even in the Parliament, may miſdemean themſelves, and they are to be puniſh'd by the Parliament, but no where elſe.

But in our Caſe, that which makes the Offence, and for which the Information is brought by the Kings Attorney, is what is done by the whole Houſe of Commons, and by virtue of their expreſs Order. Although, as I have already obſerv'd, the Information it ſelf does not expreſly own it, yet the demurrer to the Defendant's Plea (which ſets it all forth) does moſt plainly avow it. And this I am ſure is without any colour of precedent, and never was attempted till this time.

If any Man will extenuate or juſtify this way of proceeding, by ſaying, that this was not for any thing done in the Houſe, but a matter done out of the Houſe; *viz.* the Printing and Publiſhing was abroad in the Printing-Houſe, and in the Streets, and ſpreading them abroad throughout the Kingdom: Yet this will not ſalve it, for the Defendant did what he did as Speaker, and not in his private Capacity. And it was done by order of the whole Houſe and ſitting the Parliament; ſo that this Information does directly queſtion the Parliament it ſelf, and Arraigns their power and actings; for I have fully prov'd, that what the Defendant has done, is not his Act, but indeed the Acting of the whole Houſe of Commons. And I have alſo prov'd, that the Two Houſes, as to the right of the power that they claim, and uſe, is but one, and they are intire, though they may divide in the exerciſe of that power. So that it is a matter of the higheſt concernment to the Nation that poſſibly can be.

Fol. 15. Sir *E. C.* in his Fourth *Inſt.* in his Chapter of the High Court of Parliament, mentions Two Caſes only, and ſome other beginnings of a Proſecution againſt ſuch as abſented themſelves from Parliament, and departed from it without Licence; but they had no effect, as he affirms, but only againſt Six timorous Burgeſſes, (where Thirty nine Members were inform'd againſt) who *ad redimendam vexationem*, ſubmitted to Fines; but he could not find that ever they paid any.

The firſt of the Two Caſes is that of the Biſhop of *Wincheſter*, it is in the Year-Book of 3 *E.* 3. *Fol.* 18, and 19. *Fitz- H. Abr. tit. Coron. plac.* 161.

And he affirms that thoſe are all the Caſes that he can find concerning this matter.

The ſuit againſt the Biſhop was by original Writ in the *Kings-Bench*, and it charges him with a Treſpaſs and Contempt in departing from the Parliament without the Kings Licence.

The Biſhop there pleads (as the Defendant does in this Caſe) to the juriſdiction of the Court. *Et dicit quod ſi quis eorum* (ſpeaking of the Lords of Parliament,) *deliquerit erga Dominum Regem in Parliamento aliquo, in parliamento debet corrigi & emendari, & non alibi in minori curia quam in Parliamento. Unde non intendit quod Dominus Rex velit in curia hic de hujuſmodi tranſgreſſione & contemptu factis in Parliamento reſponderi.*

Note the Plea, as to the offence, is very general, not only reſtrain'd to the offence of abſenting from the Parliament, but to any treſpaſs or offence in Parliament. *Si quis deliquerit.*

And it would be a little improper to call abſence from Parliament offence committed in Parliament, for it looks like the quite contrary: But in a juſt ſence, any offence committed by a Member relating to the Parliament, though done out of the Houſe, is termed an Offence in Parliament. So Printing any thing by Order of Parliament, though it be done and executed in another place, yet it may be ſaid to be done by the Parliament, and in Parliament, if it be by their Order, and in time of Parliament.

We may note further that this is a proſecution only againſt one particular Perſon, for a particular Offence and Contempt charg'd upon him. But in our Caſe, the proſecution is againſt the very Speaker of the Parliament, and is in effect a proſecution againſt the Parliament; for it is againſt him, for what he did by command and order of Parliament, and ſitting the Parliament.

And though the Attorney-General, reply'd to the Biſhops Plea that the King might ſue in what Court he would, yet the Biſhop rejoins upon him and maintains his former Plea, and there it reſts; ſo that as Sir *E. C.* obſerves that the Biſhops Plea did ſtand and was never over-rul'd, agreeable to the reſolutions of former times. So this *J.* may claim as an authority on our ſide.

4 *Inſt. fol.* 17. And though Mr. *Plowden* the Lawyer, to the like Information put in againſt him and others, 1 and 2 *Philip* and *Mary*,

And

pleaded that he remain'd continually from the beginning to the end of the Parliament, and travers'd the abſence whereby he paſſes by the advantage of the Plea to the juriſdiction, yet this is no Authority againſt us, for he might think fit, *Renunciare juri pro ſe introducto*, having ſo true an occaſions of clearing himſelf from that ſcandalous imputation of being abſent from doing his duty in Parliament, which certainly is a very high breach of Truſt; and he might be impatient of lying under it, and therefore thought it beſt to traverſe it to clear his Reputation in that point; yet I muſt confeſs I ſhould never have advis'd it, nor was there any further proſecution againſt him.

I will mention but one moſt excellent Record more, and it is a Record out of the Parliament Rolls, 27 *E.*3. Num. 9. Sir *Robert Cotton*'s Abridgem. and with that I will Conclude. I take it to be very pertinent, and I am ſure it is very ſeaſonable.

Among the Petitions of the Commons, One is;

They pray the King, that he will require the Archbiſhop, and all other of the Clergy, to Pray for the Peace and good Government of the Land.

And for the King's good will towards the Commons.

The King's Anſwer, is,

The ſame prayſeth the King.

And I wiſh with all my heart, it were the Common-Prayer.

I have but one Prayer more to make, and that is, That this Court will allow the Defendant's Plea.

A Diſcourſe

A

DISCOURSE

Concerning the

Eccleſiaſtical Juriſdiction

IN THE

Realm of England:

Occaſioned by the Late

COMMISSION

IN

Eccleſiaſtical Cauſes.

By Sir *Robert Atkyns* Kt. of the *Honourable Order* of the *Bath*, and late One of the *Judges* of the *Court* of *Common-Pleas*.

LONDON,

Printed for *Tim. Goodwin* at the *Maiden-Head* a-gainſt St. *Dunſtans* Church in *Fleet-ſtreet*, MDCLXXXIX.

A

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Concerning the

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Occaſioned by the Late

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IN

Eccleſiaſtical Cauſes.

THE Preamble acknowledges, That the King juſtly and rightfully is, and ought to be, Supream Head of the Church of *England*, and is ſo recogniſed by the Clergy in their Convocations. And it is Enacted, That the King and his Succeſſors ſhall be taken, *&c.* the only Supream Head in Earth of the Church of *England*. And ſhall have and enjoy annexed to the Imperial Crown all Juriſdiction, *&c.* Authorities, *&c.* to the ſaid Dignity of Supream Head of the ſame Church belonging. And that the King and his Heirs and Succeſſors, Kings of this Realm, ſhall have full Power and Authority from time to time to viſit, repreſs, redreſs, reform, order, correct, reſtrain and amend all ſuch Errors, Hereſies, Abuſes, Offences, Contempts and Enormities whatſoever they be, which by any manner of Spiritual Authority or Juriſdiction ought, or may, lawfully be reformed, 26 *H.* 8. *c.* 1.

ed, repreſſed, ordered, redreſſed, *&c.* Any Uſage, Cuſtom, foreign Laws, foreign Authority, Preſcription or any thing to the contrary notwithſtanding.

Note, This Act doth not make the King to be the Supream Head of the Church of *England*, but acknowledges, that he ever hath been ſo (as it is recited by the Statute made in the ſame Parliament of 26 *H.* 8. *c.*3. the Act for the Firſt-Fruits. See the Preamble towards the latter Part, being the firſt Paragraph.) See alſo the Oath preſcribed by the Statute of 35 *H.*8. *cap.*1. for the Succeſſion, Paragraph the 11*th* in Mr. *Keeble*'s Edition of the *Statutes* at large, very full to this purpoſe, to ſhew that the Act of 26 *H.*8. *cap.*1. gave the King no new Title, but only acknowledged, that he ever had a Right to it, and that the Biſhop of *Rome* had but uſurped it.

* Sir *Hen. Hobart*'s Reports *f.*63. It is ſaid by the Judges of the *Common-Pleas*, *That the Power of Juſtice is in the King as Sovereign originally, but afterwards ſetled in ſeveral Courts, as the Light being firſt made by God, was after ſetled in the great Bodies of the Sun and Moon.*

And as the Act of 26 *H.*8. *cap.*1. gave the King no new Title, ſo it gave him no new, nor further Authority in Spiritual and Eccleſiaſtical things, nor over Spiritual and Eccleſiaſtical Perſons, than what he had before.

Therefore it is to be enquir'd what Juriſdiction or Authority the King had before the making of that Act, and how the Eccleſiaſtical Juriſdiction was of right and duly before exercis'd and adminiſtred. *viz.* in what Courts, by what Rules, Laws or Canons, and by what Perſons.

And Sir *E. Coke* 4. *Inſt. f.*70. in the *Chapter* of the *Court of Kings-Bench*, to the ſame effect.

It is clear in Law, that the King himſelf merely in his own Royal Perſon could never take to himſelf the Hearing of any Cauſe Eccleſiaſtical or Temporal, and adjudg and determine the Cauſe himſelf: For by the Law and Conſtitution of the Realm, the King hath committed all his Power Judicial to divers * Courts, ſome in one Court, ſome in another, as is held in Sir *Ed. Cokes* 2*d. Inſtitutes fol.* 186. at the lower end of that *folio*, and in the middle of *fol.*187. All Matters of Judicature and Proceedings in Law are diſtributed to the Courts of Juſtice, and the King doth judg by his Juſtices. See the *Reports* that paſs by the Name of Sir *Ed. Cokes* 12*th. Reports*, *fol.*63. the Caſe of *Prohibitions*: Which is true as to * Eccleſiaſtical Cauſes as well as Temporal; for every Man knows, that there have been from the firſt Conſtitution of the Kingdom certain Courts and Juriſdictions erected within this Realm for deciding and determining of Spiritual and Eccleſiaſtical Cauſes. *Selden*'s Hiſtory of *Tithes*, *fol.*412.

* *See the Original of Biſhops Courts and Juriſdictions ſevered from the Hundred Court diſtinct from Provincial and National Synods, and that there were then Eccleſiaſtical Laws, the Charter of K.* William *the* 1ſt. *to* Remigius *then Biſhop of* Linc. *Mr.* Selden's *Notes* ad Eadmerum *f.*167.

All this is excellently well ſet forth by the Preamble of the Statute of 24 *H.*8. *cap.*12. *concerning Appeals*. That as the King hath ever been the Supream Head of the Realm (which Word *Head* is by way of *Metaphor*, and muſt have relation to ſome (*Body*;) therefore

therefore the Statute in the Preamble proceeds to tell you, what the Body is to which the Head relates, *viz.* The Body Politick of the Realm conſiſt of all ſorts and degrees of People (within this Realm) divided by Names of *Spiritualty* and *Temporalty*. The Statute proceeds to mention the plenary Power, Authority and Juriſdiction the King hath within this Realm in all Cauſes. It ſhews us how that Power is diſtributed, and by whom to be exerciſed. Not by the King in Perſon, nor at his Will and Pleaſure in any arbitrary Way; but as that Preamble further inſtructs us, * The Body Spiritual hath Power in all Cauſes Divine and Spiritual to determin and to adminiſter all ſuch Offices and Duties as to their rooms Spiritual doth appertain; the like is declared as to Temporal Cauſes to be in the other Part of the ſaid Body Politick, call'd the *Temporalty*. And both their Authorities and Juriſdictions do concur in the due Adminiſtration of Juſtice, the one to help the other.

* Sir *Ed. Cokes* 5. Rep. The Caſe of the Kings Eccleſiaſtical Law, *f.* 40.

The Preamble of this *Stat. of* 24 *H.8. c.* 12. of Appeals further ſhews, how that this Eccleſiaſtical and Spiritual Juriſdiction, had been confirmed and defended by ſeveral antient Acts of Parliament againſt the Uſurpations of the Biſhop of *Rome* (and that long before the Reformation of Religion.) Then comes the Enacting Part, which does Ordain, That all Cauſes determinable by any Spiritual Juriſdiction, whether they concern the King himſelf (as the Caſe of the King's Divorce) or any of the Subjects, ſhall be heard, examined, diſcuſſed, clearly, finally and definitively adjudged and determined, within the Kings Juriſdiction and Authority, and not elſewhere *in ſuch* * *Courts Spiritual* and Temporal of the ſame, as the nature of the Caſes ſhall require.

* Not by extraordinary Commiſſions at the firſt inſtance, but only gradually upon Appeales Sir *John Davies* Reports *fol.* 91. the Caſe of *Premunire* 4. *Inſt.* 339. of Appeals.

Then the ſame Statute ſhews us in what Courts, and by what Steps and Method, Suits and Proceedings concerning Spiritual and Eccleſiaſtical Matters ought to be handled, *See Paragraph* 5, 6, 7, 8, 9, 10. It begins with the Arch-Deacon's Court, which is *infimi gradus*, and proceeds gradually from the *Arch-Deacon* to the *Dioceſan*, from him to the *Metropolitan*, and at laſt it mentions the *Convocation*, as the Supreameſt.

Note, That further Appeal have been given by ſeveral Acts of Parliament, as by 25 *H.8 c.* 19. from the Arch-Biſhop or Metropolitan to the King in *Chancery*, which is by Commiſſion of *Delegates*, *&c.* And it hath been Reſolved, That though the Acts of 24 *H.8. cap.* 12. and of 25 *H.8 cap.* 19. do upon certain *Appeals*, make the Sentence definitive as to any further *Appeal*, yet the King (as *Supream Head*) may grant a Commiſſion of Review: *See* the Caſe of *Halliwell* againſt *Jervois*, Sir *Francis Moores* Reports, *fol.* 462. and in the ſame Reports, *fol.* 782. in the Caſe of *Bird* againſt *Smith*, and in Sir *Edw. Cokes* 4*th. Inſtitutes*, *fol.* 341.

And as the Kings Eccleſiaſtical Power and Juriſdiction are by the Fundamental Laws of the Realm diſtributed into ſeveral Courts, which are mentioned and confirmed by the ſaid ſeveral Acts of Parliament, and may not therefore be exerciſed by any other, but by ſuch Courts, and in ſuch Method and Manner as by Law, and the ſaid Acts of Parliament it is provided: So alſo thoſe Courts cannot proceed *Arbitrarily*, but by the known and ſetled Eccleſiaſtical Laws, Conſtitutions and Canons that are in force.

By the Act of 1. *Eliz. cap.* 1. Entituled, *An Act for reſtoring to the Crown the Antient Juriſdiction over the Eſtate Eccleſiaſtical and Spiritual*, &c. the ſeventeenth *Paragraph* in *Keeble*'s Book of *Statutes*, It is Enacted, That ſuch Juriſdictions, *&c.* Spiritual and Eccleſiaſtical, as by any Spiritual or Eccleſiaſtical Power or Authority hath heretofore been, or may lawfully be, exerciſed or uſed for the Viſitation of the Eccleſiaſtical State and Perſons, and for Reformation, Order and Correction of the ſame, and of all manner of Errors, *&c.* Abuſes, Offences, Contempts and Enormities ſhall for ever by Authority of this Preſent Parliament be united to the Crown.

This Statute was the ground for Commiſſions to hear and determine Spiritual Cauſes *ad primam Inſtantiam.*

By the 18*th. Paragraph* of that Act the Queen and her Succeſſors have Power *by vertue of this Act*, by Letters Patents under the Great Seal, to aſſign, *&c.* (as often as they ſhall think meet and for ſuch time) ſuch Perſon or Perſons, as the Queen, *&c.* ſhall think meet to exerciſe all manner of Juriſdictions Eccleſiaſtical or Spiritual; and to Viſit, Reform, Redreſs, Order, Correct and Amend all ſuch Errors, *&c.* Abuſes, Offences, Contempts and Anormities whatſoever, which by any manner of Spiritual or Eccleſiaſtical Power, Authority or Juriſdiction can, or *lawfully* may be, Reformed, Ordered, Redreſſed, Corrected, Reſtrained or Amended; and ſuch Perſon or Perſons ſo to be named, *&c.* ſhall have full Power by vertue of this Act, and of the ſaid Letters Patents, to exerciſe, uſe and execute all the Premiſes according to the Tenor and Effect of the ſaid Letters Patents.

See Sir *Edw. Cokes* 4. *Inſt.* in his Chapter of Eccleſiaſtical Courts, *fol.* 324, 325. and ſee the 3*d. Obſerv. fol.* 326. obſerve the Words, *viz. It was Enacted out of neceſſity*, &c. and ibid. *Neceſſity did cauſe this Commiſſion, and it was not to be Exercis'd, but upon neceſſity; for it was never intended, That it ſhould be a continual ſtanding Commiſſion*, &c.

That the main Object of that Act was to deprive the *Popiſh* Clergy. *See fol.* 332 *Almere*'s Caſe, and *Taylor* and *Maſſie*'s Caſe, left to the proper *Dioceſan.*

Upon

Upon the laſt recited Clauſe in that of 1. *Eliz.* was grounded the late Court call'd, *The High Commiſſion Court:* From which Act it may be obſerved and collected, That it needed an Act of Parliament to give ſuch Authority to the Queen to grant ſuch Letters Patents, or Commiſſion; and that without an Act of Parliament ſuch Commiſſion could not have been granted: For if the Queen by her meer *Prerogative* and Supream *Power* in Eccleſiaſtical Cauſes could have granted ſuch Commiſſion an Act of *Parliament* had been unneceſſary. And the expreſs Words of the Act are, That the Queen, *&c.* ſhall have power, (*by vertue of this Act*) and the Law had (as hath been before obſerv'd) diſtributed the Kings Eccleſiaſtical Power and Juriſdiction into ſeveral Courts: So that, *without a new Law*, the like Power could not be put into any other hands in Derogation of thoſe ordinary Eccleſiaſtical Courts.

Secondly, *Note*, This Act makes no new Crimes nor Offences, but gives the Commiſſioners or Patentees Power to Viſit, Reform, Redreſs, *&c.* all ſuch Errors, *&c.* Abuſes, Offences, Contempts and Enormities, which by any manner of Spiritual or Eccleſiaſtical *Power* can, or *lawfully* may be, Reformed, Redreſſed, Corrected, *&c.*

In Sir *Edw. Cokes* 12. *Rep. fol.* 49: It was Reſolved, *Trin.* 6. *Jac. Per totam Curiam*, in the Court of *Common-Pleas* (there being then Five Judges of that Court, *Coke* being Chief Juſtice) That the High Commiſſioners by vertue of their Commiſſion, and that Act of *Parliament*, ought to proceed according to Eccleſiaſtical Law. *Secondly*, If their Commiſſion gave them any Power, which was not allowed or warranted by that Act of Parliament, it was not Legal (which proves that ſuch Power cannot be exercis'd by a Commiſſion under the Great Seal merely, without an Act of Parliament) See *Drake's* Caſe in Juſtice *Croke's* Reports of the time of King *Charles*, *fol.* 220.

There it is alſo Reſolv'd, That the King by his Commiſſioners cannot alter the Eccleſiaſtical Law, *nor the Proceedings of it.*

And if the Word (*Lawfully*) had not been in that Act of 1. *Eliz.* yet it muſt have been ſo intended, and the Judges of the Common Law (who are proper Judges, Expoſitors and Interpreters of Acts of Parliament) would have ſo underſtood it; as appears by the Reſolution of the Judges in the Caſe in the ſame 12. *Rep.* of the Lord *Coke*, *fol.* 84, 85. and little regard therefore was given by the Judges to Commiſſions under the Great Seal, which the Arch-Biſhop of *Canterbury* (*Abbot*) ſaid, had been made in like Caſes in the Times of King *Hen.* VIII. and *Ed.* VI.

In

In the laſt Caſe, *ibidem fol.*85. the Chief Juſtice *Coke* ſays, He had ſeen the Commiſſion made to *Cromwell* (by King *Hen.* VIII.) to be Vice-gerent, and other Commiſſions to others (by his appointment) and he refers to the Commiſſion at large inſerted in his Book of Precedents.

See in the ſame 12. *Rep.* of Sir *Edw. Coke*, *f.* 88. Excellent Rules to be obſerv'd upon ſuch extraordinary Commiſſions, *viz.* They ought to be ſolemnly read; for they may poſſibly contain many things againſt the Law (as the Commiſſion in that Caſe mentioned did.) The Commiſſioners may every one of them require Copies of the Commiſſion: The Commiſſioners ought to Sit in an open Place, and at certain Days.

Note alſo, That ſuch Commiſſions ought not to be kept ſecret, but they ought to be Enrolled in the *Chancery*, That the Subjects may be under a known Authority. See Sir *Edw. Coke*'s 4. *Inſtit. fol.*332. the middle of that *fol.* And upon irregular and illegal Commiſſions in Eccleſiaſtical Cauſes, the Remedy is by Prohibition out of the Courts at *Weſtminſter*.

☞ 4. Inſt. 340.

In the ſame 4. *Inſtit. fol.* 340. the Author hath this Note, *Nota, Stephen Gardiner* Biſhop of *Wincheſter* was depriv'd at *Lambeth* by Commiſſion from King *Edward* the VI. made to Ten Perſons, proceeding upon it, *ex Officio mero mixto vel promoto omni appellatione remotâ, ſummarie de plano, abſque omni forma & figura Judicii ſola Facti Veritate inſpecta*: The Author paſſes no Opinion upon it. *Quære*, by what Law this was warranted. It muſt be rare and extraordinary, otherwiſe Sir *Edw. Coke* would not have ſo ſpecially mention'd it, but *a Facto ad Jus non valet Argumentum.*

Note, That part of the Act of 1 *Eliz. viz.* the 18*th. Paragraph* (before *verbatim* tranſcribed) *viz.* of the Queen *Eliz.* and her Succeſſors granting ſuch Letters Patents or Commiſſions in Eccleſiaſtical Cauſes, is repealed by the Act made 16 *Car.*1. *cap.*11. See it in Mr. *Keeble*'s Book of Statutes at large. See the laſt *Paragr.* or Clauſe in that Act of Repeal of 16 *Car.*1. It is Enacted, That *no new Court ſhall be erected or appointed*, which ſhall have *The like Power* or Juriſdiction, as the High Commiſſioners had or pretended to have; but that all ſuch *Letters Patents*, *Commiſſions* and Grants, and all Powers and Authorities thereby granted, and all Acts, Sentences and Decrees to be made by vertue or colour of them ſhall be *Void.*

Note, The late Act of 13 *Car.*2. *cap.*12. in Mr. *Keeble*'s Book of Statutes, does declare that the Ordinary Power of Arch-Biſhops and Biſhops was not taken away by that Repealing Act of 17 *Car.*1. *cap.*11. (as this laſt *Act* dates it.) But

But by this *Act* of 13 *Car.*2. *cap.*12. in the second *Paragraph.* The aforesaid Repealing *Act* of 17 *Car.*1. and all the Matters and Clauses therein contained (excepting what concerns the High Commission Court; or, *the new Erection of some such like Court by Commission*) are Repealed. See the third *Paragraph* also of the *Act* of 13.*Car.*2. That the *High Commission Court* shall not be Revived.

So that I conceive, no such *Commission* nor Letters Patents can now be granted, but the Repealing *Act* of 16, or 17 *Car.*1. stands in force against it.

By what Law or Rules *Cromwell* in the Time of King *Henry* VIII. and by what Instructions he acted, does not appear; the *Commissions* to make him *Vicar General* (which was surely in Imitation of what had been used by the Pope in the time of his Usurpation) or that of *Vice-gerent* in Ecclesiastical Matters (which seems to be new and *primæ Impressionis*) are not now to be found. Dr. *Burnet* in the History of the *Reformation* of the *Church of England*, makes some probable conjectures, and wherein consisted the difference between those *Authorities* and Titles, and the Commissions for the exercise of them is not easy to find out: But the thing they principally design'd was to suppress the religious Houses belonging to the regular Clergy, which were great supports to the *Popish* Hierarchy, not at all to impeach the Lawful Power and Jurisdiction of Episcopacy; for we find at the same time as *Cromwell*'s Commissions were in force, and had been then but newly passed, That *Cranmer* Arch-Bishop of *Canterbury*, made his Metropolitical Visitation; under which (as I conceive) most properly falls the Conusance of any contempt or abuse committed by any of his Suffragan Bishops; if not in a * Provincial Synod, *Archiepiscopi Jurisdictioni subsunt immediate suffraganti.* See *Lind.Provin.*

Dr. *Burnet*'s Hist. of the Reformation, 183. *in d. folii.*

* See Dr. *Field* of the Church, *fol.* 511,512. The antient *Canon* requires the consent of 12. Bishops to censure, judge and depose a Bishop.

The exclusion of the Pope in the Time of King *Hen.*VIII. made no diminution of the Power or Jurisdiction of the Clergy, as to determining of Ecclesiastical Causes, or making Canons, Constitutions and other Synodical Acts, as is rightly observ'd by Dr. *Heylin* in his Introduction to the History of *Laud* late Arch-Bishop of *Canterbury*; upon this ground it is, that to this day they exercise all manner of Ecclesiastical Jurisdiction in their own Names, and under the distinct Seals of their Offices, the Statutes that made some *Alteration* in the matter being all repealed: See Dr. *Heylin*'s *Introduct.* aforesaid, *ibid. fol.* 341.

The Legislative Power in Matters Ecclesiastical continues in the *Convocation* for making Canons and Constitutions confirmed by the King and Parliament; Discipline and the Admonition still resides in the Bishops and those under them.

In Case of any Irregularity in the Metropolitan, Resort must doubtless be to the Head of the Church upon Earth (the King) as it was in the Case of Arch-Bishop *Abbot*, who shooting at a Deer unfortunately kill'd the *Keeper*; and his Jurisdiction (he being suspended) was supplyed by Commission, as you may read in Dr. *Heylin* of the Life of Arch-Bishop *Laud*, in the 87*th fol.* of the Book it self, but more fully, *fol.* 170.

The Bishop of *London* is next in Place and Dignity to the Metropolitans, see his Priviledges, *ibid.* 185.

See Dr. *Heylin*'s Judgment in the Work of Reforming the Church, either in Doctrine or Exercise of the Discipline, pertinent to the Matter now in hand, but in Point of Law it would be no very difficult thing to discover him to be mistaken, *fol.* 327.

him to the Power of the Metropolitan, and of the *Appeal* from that there is no [illegible] Synod, and a Stop put there, and a *ne ultra*, and Judge in *Ecclesiastical* upon *Earth* appointed to be the Supream *Nice*, discours'd of by Dr. *Stillingfleet* in the Opinion of the *Council* of *tish Churches*, *fol.* 100. but still it must be understood, that this fixed Power in the *Ecclesiastical Judges* and Courts in *England*, is deriv'd from the Crown; but now under the Crown setled in this Method not to be interrupted; this is *quoad* * *Potestatem Jurisdictionis non Ordinis.*

* See Mr. *Bagshaw*'s Arguments in Parliament against the Canons made by the *Convocation*, 1640 *fol.* 19.

FINIS.